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IN THE

Supreme Court of the United States

October Term, 1969
No. 962

SOUTH BAY DAILY BREEZE, a Division of Southern California Associated Newspapers, Inc.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	5
I. The Decision Below Admittedly Conflicts With Decisions of the Fifth Circuit and the Seventh Circuit as to Whether the Fourth Amendment Exclusionary Rule Is Applicable in Cease-and-Desist Proceedings Before Federal Administrative Agencies	5
II. The Decision Below Conflicts Directly With a Decision of the Seventh Circuit as to Whether the Fourth Amendment Requires the Exclusion of Evidence Obtained Through Private Theft and Introduced by the Government in Administrative Proceedings	9
III. The Court Below Has Decided an Important Question of Federal Statutory Law Which Has Not Been, but Which Should Be, Settled by This Court	15
Conclusion	17

TABLE OF AUTHORITIES CITED

Cases	Page
Burdeau v. McDowell, 256 U.S. 465	11, 12, 13, 14
Camara v. Municipal Court, 387 U.S. 523	8
Corngold v. United States, 367 F.2d 1	13
Elkins v. United States, 364 U.S. 206	11, 12, 13, 14
FTC v. American Tobacco Company, 264 U.S. 298	7
Jones v. SEC, 298 U.S. 1	7
Knoll Associates, Inc., — F.T.C. — [1965-1967 Transfer Binder] Trade Reg. Rep. ¶ 17,668 (1966)	9, 11
Knoll Associates v. FTC, 397 F. 2d 530	6, 9, 10, 11
Lustig v. United States, 338 U.S. 74	13
Mapp v. Ohio, 367 U.S. 643	12
NLRB v. Bell Oil & Gas Co., 98 F.2d 870	6, 7
Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186	7
Olmstead v. United States, 277 U.S. 438	16
Weeks v. United States, 232 U.S. 383	12

Miscellaneous	
Report of the ABA Commission to Study the Federal Trade Commission (1969), p. 20	8
33 National Labor Relations Board, Ann. Report (1968), p. 15	8

Statutes	
National Labor Relations Act, Sec. 1(b)	15
National Labor Relations Act, Sec. 8(a)(1)	4, 7
National Labor Relations Act, Sec. 8(a)(5)	4, 7
National Labor Relations Act, Sec. 10(a)	3
National Labor Relations Act, Sec. 10(e)	4

Page

Robinson-Patman Act, Sec. 2(a) 6, 7

61 Statutes at Large, p. 136 2

73 Statutes at Large, p. 519 2

United States Code, Title 18, Sec. 401 6

United States Code, Title 28, Sec. 1254(1) 2

United States Code, Title 29, Sec. 141, et seq. 2

United States Code, Title 29, Sec. 141(b) 15

United States Code, Title 29, Sec. 160 6

United States Code, Title 29, Sec. 160(a) 3

United States Code, Title 29, Sec. 160(e) 4, 6

United States Constitution, Fourth Amendment 2, 5, 6, 7, 8, 9, 10, 12, 13, 14, 16

United States Constitution, Fifth Amendment 12

United States Constitution, Fourteenth Amendment 12

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SOUTH BAY DAILY BREEZE, a Division of Southern California Associated Newspapers, Inc.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner, South Bay Daily Breeze, a division of Southern California Associated Newspapers, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this proceeding.

Opinions Below.

The opinion of the Ninth Circuit is reported at 415 F.2d 360 (9th Cir. 1969) and is reprinted in Appendix A, pp. 1a-18a[1]. The decision and order of the National Labor Relations Board are reported at 160 NLRB 1850 (1966) and are reprinted in Appendix B, pp. 19a-61a.

[1]The appendices are bound in a separate volume because of their length.

Jurisdiction.

The judgment of the Ninth Circuit was entered on August 1, 1969. Petitioner's timely petition for rehearing was denied on September 19, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Whether the Fourth Amendment rule requiring the exclusion of illegally obtained evidence applies to evidence introduced by the Government in cease-and-desist proceedings before federal administrative agencies.

2. If so, whether the Fourth Amendment rule requiring the exclusion of illegally obtained evidence applies to evidence obtained through theft by the charging party in an unfair labor practice proceeding before the National Labor Relations Board and offered into evidence by the General Counsel for the Board.

3. Whether the National Labor Relations Act prohibits the enforcement of an order of the National Labor Relations Board in an unfair labor practice proceeding when the order is based upon evidence obtained through theft of the charging party and offered into evidence by the General Counsel for the Board.

Constitutional and Statutory Provisions Involved.

This case involves the Fourth Amendment to the Constitution of the United States, Appendix C, p. 62a, and the National Labor Relations Act,[2] 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 141, *et seq.*, Vol. 7 U.S.C. p. 6289, *et seq.* (1964), pertinent portions of which are set forth in Appendix D, pp. 63a-66a.

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[2]Hereinafter referred to as the "Act".

Statement of the Case.

Petitioner publishes newspapers in Torrance, California. After soliciting several authorization cards from petitioner's editorial department employees, the Los Angeles Newspaper Guild demanded that petitioner either recognize it as their bargaining representative or that an election among them be conducted by the National Labor Relations Board. Doubting that the Guild represented a majority of the employees, petitioner rejected the Guild's request for recognition. The Guild did not receive a majority of the votes cast in the election that followed. The Guild then charged that petitioner had committed unfair labor practices and objected to the election.

Gary Gillis, a Guild agent and a key solicitor of authorization cards,[3] stole a private memorandum from the city editor's desk.[4] Gillis made a copy and delivered it to the Guild's international representative, who in turn delivered it to the Board's General Counsel. Over petitioner's timely objection, the General Counsel introduced the memorandum into evidence at the unfair labor practice hearing after Gillis had testified how he had obtained it. R.T. 89-96.

The jurisdiction of the Board was asserted under Section 10(a) of the Act, as amended, 29 U.S.C. §160 (a), and was based upon a finding that petitioner's activities affected interstate commerce. App. B, p. 54a. Rejecting petitioner's argument that the stolen document was inadmissible, the Board relied on it to support

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[3]App. B, p. 23a.

[4]Gillis testified without contradiction that he took the document from the desk drawer without permission. R. T. 93-94.

its conclusion that petitioner had committed unfair labor practices in violation of Sections 8(a)(1) and 8(a)(5) of the Act and that its conduct had affected the result of the election. On October 12, 1966, the Board ordered that the election be set aside, that petitioner cease and desist from committing unfair labor practices, and that it bargain with the Guild upon request.[5]

The Board sought enforcement of its order in the Ninth Circuit pursuant to Section 10(e) of the Act, as amended, 29 U.S.C. §160(e). Rejecting petitioner's argument that the stolen document was inadmissible, the Ninth Circuit held, in conflict with other circuits, that the exclusionary rule is inapplicable in administrative cease-and-desist proceedings and that the Fourth Amendment does not require the exclusion of evidence obtained through private theft. The court concluded, however, that if admission of the document was improper, its prejudicial effect was sufficient to preclude enforcement of the Board's order. 415 F.2d 360, 363; App. A, p. 4a. The Ninth Circuit has stayed issuance of its judgment pending the filing of this petition.

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[5]The bargaining order was based on a finding that the Guild represented a majority of the employees in the bargaining unit. Of the 25 employees in the unit, 15 signed cards designating the Guild as their bargaining representative. Two of these cards were rejected in proceedings below. Moreover, employee Cole signed an authorization card after a Guild agent told him specifically that signing the card would not commit him to the Guild and that he could forget the language of the card authorizing the Guild to represent him. App. B, p. 48a. Thus, if Cole's card was improperly counted, the Guild represented less than half of the employees in the bargaining unit.

REASONS FOR GRANTING THE WRIT.

There are three reasons why certiorari should be granted in this case. First, as the court below observed, the circuits are in conflict as to whether the Fourth Amendment exclusionary rule is applicable in administrative cease-and-desist proceedings. The circuits are likewise in conflict as to whether the Fourth Amendment requires the exclusion of evidence obtained through private theft and introduced by the Government in those proceedings. Finally, this Court has not resolved whether the National Labor Relations Act requires that evidence stolen by the charging party be excluded from an unfair labor practice hearing.

I.

The Decision Below Admittedly Conflicts With Decisions of the Fifth Circuit and the Seventh Circuit as to Whether the Fourth Amendment Exclusionary Rule Is Applicable in Cease-and-Desist Proceedings Before Federal Administrative Agencies.

In rejecting petitioner's contention below that the document stolen by Gillis was inadmissible, the Ninth Circuit held that the Fourth Amendment exclusionary rule is inapplicable in unfair labor practice proceedings. 415 F.2d 360, 364; App. A, p. 6a. According to the Ninth Circuit, the Fourth Amendment "has only applied where 'criminal' or 'quasi-criminal' sanctions might be imposed." *Id.* Because criminal sanctions are not directly involved in this case,[6] the court held

[6] Although criminal sanctions were not directly available in this case, the Ninth Circuit's statement that they were not "involved"

(This footnote is continued on the next page)

that the exclusionary rule was inapplicable. Citing *Knoll Associates v. FTC,* 397 F.2d 530 (7th Cir. 1968),[7] and *NLRB v. Bell Oil & Gas Co.,* 98 F.2d 870 (5th Cir. 1938), as contrary authority, the Ninth Circuit acknowledged that its holding conflicted with decisions of other Courts of Appeals. This declared and important conflict demands resolution by this Court.

In *Knoll Associates v. FTC, supra,* the FTC charged that Knoll had violated Section 2(a) of the Robinson-Patman Act and urged that Knoll be ordered to cease and desist from further violations. In the hearing that followed, the Commission introduced documentary evidence which a disgruntled employee of Knoll's sales representative had stolen from his employer. The FTC concluded from this evidence that Knoll had violated Section 2(a) and ordered it to cease and desist from further violations.

On review the Seventh Circuit set the order aside, holding in part that the Fourth Amendment exclusionary rule applies with full force in Commission proceedings. The court stated laconically that "We must not be misled by the legal classification of the nature of the proceeding." 397 F.2d 530, 534; App. E, p. 75a.

As the Ninth Circuit conceded, the FTC proceeding in *Knoll* is for constitutional purposes indistinguishable from the Board proceeding in this case. Both Knoll and petitioner were charged by a federal agency

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is misleading. Violation of a Board order is not punishable by law. 29 U.S.C. §160. If, however, a Court of Appeals enforces a Board order, as the Act provides, 29 U.S.C. §160(e), violation of the court's decree may constitute contempt punishable by fine or imprisonment or both. 18 U.S.C. §401.

[7]The decision of the Seventh Circuit in *Knoll* is reprinted in Appendix E, pp. 67a-82a.

with a violation of a federal statute, the only immediate sanction for which is an order to cease and desist.[8] Neither action was "criminal" in nature, for violations of Section 2(a) of the Robinson-Patman Act and Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act are not punishable by traditional criminal sanctions. Yet the consequences of each are nonetheless serious: As Knoll undoubtedly faced private litigation and a loss of customers, so petitioner faces the consequences of an order to bargain with a labor organization.

The court below and the Fifth Circuit are in similar conflict. As an obvious example of incompetent evidence in Board proceedings, the Fifth Circuit cited evidence unconstitutionally obtained. *NLRB v. Bell Oil & Gas Co.*, 98 F.2d 870 (5th Cir. 1938). The court then declared:

> "If the Board should base its findings solely upon evidence obtained by an unconstitutional search, the order resting thereon would be invalid, because such evidence is incompetent." 98 F.2d 870, 871 (dictum).

Although it is clear that the search warrant requirements of the Fourth Amendment apply to investigations conducted by administrative agencies, see *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 207-208 (1946); *Jones v. SEC*, 298 U.S. 1, 26-27 (1936); *FTC v. American Tobacco Company*, 264 U.S. 298, 305-306

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[8]Petitioner in the instant case has also been ordered to bargain with the Guild upon request and to post notices announcing that it will cease committing unfair labor practices. App. B, pp. 58a-59a.

(1924), this Court has not resolved whether the Fourth Amendment and the exclusionary rule apply to administrative cease-and-desist proceedings. Certainly it has not limited the protection of the Fourth Amendment to persons suspected of having committed a crime. *See, e.g., Camara v. Municipal Court,* 387 U.S. 523 (1967). (Inspection for housing code violations without a search warrant held unconstitutional.)[9]

This conflict between circuits is important and is one which warrants this Court's attention. The cease-and-desist order is the procedural backbone of many federal agencies. In fiscal 1968, for example, the NLRB issued in contested decisions alone over 900 orders similar to its order in this case.[10] Likewise in fiscal 1969, the FTC decided 221 cases in which an order to cease and desist was the ultimate sanction.[11] Petitioner submits that respondents in these proceedings are entitled to the protection of the exclusionary rule. Two Courts of Appeals disagree with the court below as to whether the right may be asserted under these circumstances. By granting the writ prayed for in this petition, this Court can resolve that question.

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[9]In *Camara* this Court remarked: "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." 387 U.S. 523, 530.

[10]33 NLRB Ann. Rep. 15 (1968).

[11]Report of the ABA Commission to Study the Federal Trade Commission, at 20 (1969).

II.

The Decision Below Conflicts Directly With a Decision of the Seventh Circuit as to Whether the Fourth Amendment Requires the Exclusion of Evidence Obtained Through Private Theft and Introduced by the Government in Administrative Proceedings.

As an alternative to its holding that the exclusionary rule is inapplicable in unfair labor practice proceedings, the court below decided that if it applied, the stolen document was nevertheless admissible because the Board did not participate in the theft. This holding also conflicts with the Seventh Circuit's decision in *Knoll Associates v. FTC*, 397 F.2d 530 (7th Cir. 1968) *reversing* __ F.T.C. __, [1965-1967 Transfer Binder] Trade Reg. Rep. ¶17,668, p. 22,952 (1966).[12]

The circumstances in *Knoll* are strikingly similar to the facts of this case. A year after the FTC had charged that Knoll had violated the Robinson-Patman Act, Prosser, the disgruntled employee, informed the Commission's lawyers that he possessed incriminating evidence against Knoll. The lawyers rejected Prosser's offer. [1965-1967 Transfer Binder] Trade Reg. Rep. 22,952; 22,965. Thereafter Prosser stole the documents and renewed his offer to the Commission, assuring the lawyers that the documents were not Knoll's property and that he had taken them from his personal files. Upon that understanding the lawyers accepted them.

The Seventh Circuit held that the FTC's use of the stolen documents violated Knoll's Fourth Amendment

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[12]Pages 22,959 through 22,962 of the Commission's opinion are reprinted in Appendix F, pp. 83a-91a, to clarify the Seventh Circuit's cryptic statement of the facts.

rights, even though Government agents neither participated in nor encouraged the theft. The court declared:

> "The action of the Commission in utilizing the fruits of the misconduct of Prosser violated rights of petitioner protected by the fourth amendment to the federal constitution. The undisputed evidence shows that Prosser stole the documents for the purpose of assisting the Commission counsel in the prosecution of the proceeding then pending, and the record shows that the Commission *by its use of the documents*[13] knowingly gave its approval to Prosser's unlawful act. . . ." 397 F.2d 530, 533; App. E, p. 74a.

The decision below conflicts directly with this holding. Like the FTC in *Knoll,* the Board neither participated in nor encouraged Gillis' theft of the memorandum, but used it after learning that it had been stolen. The Seventh Circuit concluded that in such a case the Fourth Amendment requires that the evidence be excluded. The Ninth Circuit now erroneously has held it admissible.

Recognizing this conflict, the Ninth Circuit purported to distinguish *Knoll* on two grounds: (a) that Prosser acted as a government agent; and (b) that, unlike the thief in this case, Prosser stole the documents for the purpose of assisting the Commission. Both distinctions are untenable.

The Seventh Circuit did not hold in *Knoll* that "the actions of the government and the thief were so related as to make the thief a government agent. . . ." as the

[13]Emphasis here as elsewhere is added unless otherwise noted.

Ninth Circuit asserts. 415 F.2d 360, 363; App. A, p. 6a. At no point in its opinion does the Seventh Circuit contradict the findings of the Commission that the FTC neither participated in nor encouraged Prosser's independent theft of the documents. [1965-1967 Transfer Binder] Trade Reg. Rep. 22,952, 22,966. Instead, the *Knoll* court held the evidence inadmissible because the Commission had approved Prosser's unlawful act by using the documents he had stolen. 397 F.2d 530, 536; App. E, p. 80a.

That Prosser's motive was to assist the FTC likewise provides no relevant distinction between *Knoll* and this case. Admittedly, the Seventh Circuit made note of Prosser's motives in its opinion. But the findings in *Knoll* establish that the FTC in no way encouraged Prosser's actions. The Seventh Circuit held the stolen evidence inadmissible because the FTC effectively ratified Prosser's theft by using it. Prosser's motives, therefore, are simply not relevant to the holding of the court.

In concluding that the stolen evidence was admissible, the court below believed it was constrained to follow *Burdeau v. McDowell,* 256 U.S. 465 (1921). This Court's decision in *Elkins v. United States,* 364 U.S. 206 (1960), petitioner submits, overruled *Burdeau* by implication. Decisions of this Court since 1921 have bypassed the *Burdeau* rule; it now awaits only formal overruling.[14]

[14]Moreover, this case is factually distinguishable from *Burdeau* because of the unique status of a charging party in an unfair labor practice proceeding. The thieves in *Burdeau* had no connection with the Government. In this case, however, the thief was clearly an agent of the Guild, the charging party in the proceeding in which the evidence was introduced. The relationship between a charging party and the General Counsel is

(This footnote is continued on the next page)

In *Burdeau,* private detectives delivered papers they had stolen from McDowell's office to the Department of Justice. As the Attorney General prepared to present them to a grand jury, McDowell petitioned for their return, claiming that the Government's use of stolen evidence would violate his Fourth and Fifth Amendment rights. Over the dissent of Justices Brandeis and Holmes, this Court held that McDowell's petition should have been denied because the Government had had nothing to do with the theft of the papers. The Fourth Amendment, this Court declared, does not require the exclusion of evidence not obtained by Government agents.

In *Elkins v. United States,* 364 U.S. 206 (1960), this Court held that evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's Fourth Amendment rights, is inadmissible in a federal trial even though federal officers did not participate in the search and seizure. At the time of that decision, state courts were not obliged to exclude evidence unconstitutionally obtained.[15] The exclusionary rule announced in *Weeks v. United States,* 232 U.S. 383 (1914), applied only to federal courts. Yet even though the rule was not directed

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intimate and unique: Though the charging party initiates the action by filing a charge, the General Counsel for the Board prosecutes it, usually with the charging party's assistance. Thus the General Counsel was provided with evidence in this case obtained by the party whom he effectively represented. (In fact, the Guild did not even appear by other counsel at the hearing.) Although the General Counsel neither participated in nor encouraged the theft of the document, his relationship to the charging party distinguishes this case from the circumstances presented in *Burdeau v. McDowell.*

[15] *Mapp v. Ohio,* 367 U.S. 643 (1961), held that the Fourteenth Amendment requires state courts to exclude evidence unconstitutionally obtained.

at state officers, *Elkins* held that it applied to evidence obtained by them, for in that way there could be no inducement to federal agents to evade the Fourth Amendment through other officials not so restricted. This Court declared:

> "Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered." 364 U.S. 206, 221-222.

This rationale is equally applicable to evidence obtained by private individuals. As the "silver platter doctrine"[16] provided an inducement to federal officers tactily to encourage state officers to obtain evidence by methods the federal officers could not employ, so the *Burdeau* rule provides the same inducement for the tacit encouragement of private individuals.[17] In this case, as in *Elkins*, there is no indication that Govern-

[16] *Lustig v. United States*, 338 U.S. 74, 79 (1949).

[17] *Cf. Corngold v. United States*, 367 F.2d 1, (9th Cir. 1966) (lacking search warrant, customs officials encouraged airline agent to open defendant's packages under authority of contract of carriage; evidence thus obtained held inadmissible).

ment agents had any knowledge of the theft until after it had been accomplished.[18] And as in *Elkins*, the Government in this case has used the evidence thus obtained. Because the *Elkins* rationale is equally applicable in these circumstances, petitioner submits that *Elkins* overruled *Burdeau* by implication. This Court should now consider the question directly.

As this Court observed in *Burdeau*, the purpose of the Fourth Amendment is to protect the privacy of the individual against invasions by the Government, not against trespasses by private citizens. Petitioner does not contend otherwise. But it does not follow from that statement of purpose that the Government should therefore be permitted in federal proceedings to use evidence obtained illegally through non-governmental sources. Such a rule subverts the purpose of the Fourth Amendment, for it provides inducement to the Government to encourage illegal private action and to barter with thieves for the fruit of their crimes. Faced in *Elkins* with a similar relationship between federal agents and unrestrained state agents, this Court rejected the "silver platter" doctrine. Petitioner submits that it should now consider whether to do likewise with respect to thefts by private individuals.

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[18]Petitioner concedes for the sake of argument that the General Counsel did not learn that Gillis had stolen the document until he testified at the hearing. After Gillis testified that he had stolen the document, the General Counsel introduced it into evidence. R. T. 95.

III.

The Court Below Has Decided an Important Question of Federal Statutory Law Which Has Not Been, but Which Should Be, Settled by This Court.

The Ninth Circuit rejected petitioner's argument that the admission in Board proceedings of evidence illegally obtained by a member of a labor union subverts national labor policy, as declared by Congress in the Act, and that an order based upon such evidence should for that reason not be enforced. Petitioner submits that this question is critically important to the fair conduct of Board proceedings; that the Ninth Circuit decided it incorrectly; and that it should now be settled by this Court.

The preamble to the Act declares that industrial peace is the object of this legislation.[19] Indispensable to a peaceful system for settling labor disputes is a rule that only fair means be used in preparation for the proceedings. A party to a labor proceeding should legitimately expect that his opposition will employ only lawful devices in preparing its case. The Board and the courts must protect this expectation; the peaceful system Congress sought will otherwise break down.

Petitioner submits that to implement this right and to discourage its violation, this Court should hold that

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[19]Section 1(b) of the Act states: "Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest." 29 U.S.C. § 141(b) (1964).

evidence obtained illegally by either party to a labor dispute is inadmissible in unfair labor practice proceedings and that an order grounded in such evidence is unenforceable in the Courts of Appeals. To admit such evidence is to escalate unnecessarily the existing conflict between labor and management.

Speaking of evidence obtained through illegal wiretapping. Justice Holmes said, dissenting in *Olmstead v. United States,* 277 U.S. 438 (1928):

> ". . . [A]part from the Constitution the Government ought not to use evidence obtained and only obtainable by a criminal act. There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules. Therefore, we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part." 277 U.S. 438, 469-70.

The statement is apposite to this case. Whatever the requirements of the Fourth Amendment, the Board ought not to use evidence obtained by a criminal act. The practice and procedure of federal administrative agencies should be a model for the rest of the country.

Excluding evidence from federal proceedings that individuals have obtained illegally serves that purpose, for it demonstrates federal unwillingness to permit or to encourage unlawful activity to accomplish lawful ends. Hence petitioner submits that this Court should now consider whether the Act requires that such evidence be excluded from unfair labor practice proceedings.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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December 17, 1969.

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Appendices to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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INDEX TO APPENDICES

Appendix Page

Appendix A. Opinion of the United States Court of Appeals for the Ninth Circuit, *NLRB v. South Bay Daily Breeze,* 415 F.2d 360 (9th Cir. 1969).. 1a

Appendix B. Decision and Order of National Labor Relations Board, *South Bay Daily Breeze and Los Angeles Newspaper Guild, Local 69,* 160 NLRB 1850 (1966) 19a

Appendix C. United States Constitution, Amendment IV 62a

Appendix D. National Labor Relations Act, as Amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 141 et seq., Vol. 7, U.S.C. p. 6289 et seq. (1964), in Pertinent Part 63a

Appendix E. Opinion of the United States Court of Appeals for the Seventh Circuit, *Knoll Associates, Inc. v. FTC,* 397 F.2d 530 (7th Cir. 1968) 67a

Appendix F. Portion of the Opinion of the Federal Trade Commission, *Knoll Associates Inc.* 83a

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit

National Labor Relations Board, Petitioner
v.
South Bay Daily Breeze, Respondent
No. 21949

August 1, 1969

Petition to Enforce
National Labor Relations Board Order

Before: BARNES and CARTER, Circuit Judges, and BYRNE,* Senior District Judge.

BARNES, Circuit Judge:

This case is before us pursuant to section 10(e) of the National Labor Relations Act, 29 U.S.C. §160(e) (1964), which authorizes our review of orders issued by the National Labor Relations Board. The Board has petitioned for enforcement against the respondent, South Bay Daily Breeze, of an order issued on October 12, 1966, and reported (along with the Board's decision) at 160 N.L.R.B. 1850 (1966).

Respondent publishes a daily newspaper in Torrance, California. In April, 1965, an international representative of the American Newspaper Guild met with three employees of respondent and discussed with them the advantages of Guild representation. An organizing campaign followed. Fifteen signed authorization cards were soon obtained, and the international representative sent a telegram to respondent, requesting recognition as the bargaining agent of respondent's editorial employees. Estimates regarding the size of the appropriate bar-

*Hon. William M. Byrne, Senior United States District Judge, Los Angeles, California, sitting by designation.

gaining unit at that time ranged from twenty-two to twenty-eight employees, and respondent's publisher, Robert Curry, expressing doubt that the Guild represented a majority of the employees in the unit, refused to grant such recognition. A National Labor Relations Board election was subsequently scheduled for July 20, 1965.

In the interim, several incidents relevant to this litigation occurred. First, in a representation hearing before the Board's Regional Director, the appropriate unit was fixed at twenty-five employees. Respondent waived its right to seek Board review of that determination. Second, certain of respondent's supervisors questioned various employees concerning their pro or anti-union sympathies, at times suggesting with some specificity that pay increases would follow the election. Statements were made by supervisors to the effect that there were "ways" of ascertaining who supported the union, and that if the union were approved, work rules would be manipulated so that such persons could be discharged.[1] In addition, the possibility of a blacklist of union sympathizers was suggested.

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[1]The following testimony, for example, was given by employee Patricia McDonnell with respect to a conversation between her and News Editor, Kenneth Johnson, concerning the possible consequences of a union victory:

"He said things would be tougher, and I said, 'How could it be, if [the employees] would be protected for six months after an election?'

"And he said, 'Well, so the Guild get in. Then you know how Lori [Geittmann, an employee,] is late all the time. We just change her hours, and I will have her come in at 5:00 in the morning, and you know how long it would take before Lori is being late.'

"And he said, 'We could dismiss her after a week.'

"When it came to Bob Jones, he said, 'You know what an old maid he is about his routines and his schedules; all we have to do is put him on a split shift, and he couldn't take that very long.' " Record, vol. 9, at 475.

After the election, which resulted in a tie vote,[2] the Guild filed with the Board timely objections to respondent's conduct. The Board set aside the election and found that respondent had violated the Act (1) by interfering with its employees' rights under section 7 to choose their bargaining agent freely and without coercion, and (2) refusing to bargain with the Guild. The resulting order prohibited respondent from continuing to engage in the unfair labor practices found to have been committed and from interfering in any other manner with its employees' rights under the Act. Affirmatively, respondent was ordered to bargain with the Guild upon request.

I
EMPLOYERS' INTERFERENCE

Respondent's challenge to the finding that it interfered with its employees' free choice of a bargaining agent during the pre-election period is limited to the argument that a document relating to its conduct was improperly considered by the Board. Indeed, that argument would seem to constitute the only possible attack on the findings referred to, since there clearly exists substantial support for the conclusions that respondent's supervisors interrogated employees, gave the impression of surveillance regarding their union activities, promised post-election benefits, and threatened that various unpleasant consequences might befall union supporters.

The document in question is a memorandum prepared for publisher Curry by News Editor Kenneth Johnson. It provided the trial examiner and the Board with

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[2]The vote was 13-13, one newly hired employee apparently having been added to the unit prior to the election.

highly persuasive evidence that respondent was during the pre-election period attempting to interfere with the free choice of its employees.[3] The basis for respondent's challenge to the admissibility of the memorandum lies in the fact that it was taken from Johnson's desk without permission by employee Gary Gillis.

We may assume that if admission of the memorandum into evidence was improper, its prejudicial effect is sufficient to preclude enforcement of the Board's order (at least insofar as that order relates to the findings of interference with the section 7 rights of respondent's employees); its probative force is such that it very likely played at least some relatively significant part in the trial examiner's resolution of the questions before him. Nevertheless, we are unable to hold in favor of respondent, for we do not view admission of the memorandum as error.

Respondent contends that the document should have been excluded on the ground that it was obtained in violation of the Fourth Amendment. In rejecting this contention, we are controlled both by the Supreme Court's only holding squarely on point and that Court's description of the judicial protection afforded by the amendment. In our judgment, neither prerequisite for invocation of the Fourth Amendment (proscribed conduct by a government official and prosecution of a criminal nature) is here present.

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[3]Regarding one employee, for example, the memorandum reported,

> "Sees dollar signs, thinks he's better and worth more than he is. Is very impressionable. Listens to me a lot, and a last minute promise of more money from me would weigh heavily on his decision. . . . He is the kind you worry about selling the day of the election." Record, vol. 1, at 71.

In *Burdeau v. McDowell,* 256 U.S. 465 (1921), the Court ruled that the use in a criminal prosecution of personal papers stolen from the accused by a private individual did not violate the accused's Fourth Amendment rights when the government was in no way involved in the theft. Although challenged in cases decided after the Court's holding in *Elkins v. United States,* 364 U.S. 206 (1960), outlawed federal use of evidence illegally obtained by state agents (*e.g., United States v. McGuire,* 381 F.2d 306, 313-14, n. 5 (2d Cir. 1967), *cert. denied,* 389 U.S. 1053 (1968)), the *Burdeau* holding has not been overruled. A recent decision by the Seventh Circuit, *Knoll Associates, Inc. v. F. T. C.,* 397 F.2d 530 (7th Cir. 1968), is not inconsistent with our reading of Burdeau. While there holding that evidence illegally seized by an employee should not have been admitted because of Fourth Amendment violations, the Court stated that, "[t]he undisputed evidence shows that [the disloyal employee] stole the documents for the purpose of assisting the Commission counsel in the prosecution of the proceeding then pending, and the record shows that the Commission by its use of the documents knowingly gave its approval to the employee's act." *Id.* at 533. This is conduct not countenanced by *Burdeau,* where the Court made pointed reference to the fact that government action was not present in the taking.[4] 256 U.S. at 476.

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[4]This distinction was recognized by the *Knoll's* court, *supra,* which stated at 536 n.5, "In contrast [to *Burdeau*] in the case at bar . . . the disloyal employee, furnished to Bernard Turiel [the government agent] by telephone information which established the connection between the Commission and Knoll, resulting in Prosser's [the employee] testifying as a Commission witness against Knoll. The facts in this case are the antithesis [*sic*] of those in *Burdeau.*"

In *Knoll, supra,* the actions of the government and the thief were so related as to make the thief a government agent and his conduct unacceptable under long standing Fourth Amendment grounds. *Gambino v. United States,* 275 U.S. 310 (1927). The present case is significantly different. There is no showing here that the purpose for which the memorandum was taken was to aid the Board in its case against respondent; Gillis' testimony, in fact, was to the contrary. 6 R.T. at 99. The document was taken prior to the election and some time before these proceedings were initiated. In such circumstances, at least, the mere evidentiary use by the General Counsel of the memorandum does not constitute prohibited conduct. *Compare: Barnes v. United States,* 373 F.2d 517 (5th Cir. 1967) with *Corngold v. United States,* 367 F.2d 1 (1966).

Even if we did not reject respondent's contention as incompatible with the *Burdeau* mandate, we would decline to invoke constitutional protection because the Board's proceeding was not one subject to the standard of the Fourth Amendment. Traditionally, that amendment has only applied where "criminal" or "quasi-criminal" sanctions might be imposed. *Camera v. Municipal Court,* 381 U.S. 253 (1967); *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693 (1965); *Boyd v. United States,* 116 U.S. 616 (1885). The object of those proceedings "is to penalize for the commission of an offense against the law." 380 U.S. at 700. This is not the case here, since neither criminal procedures nor sanctions are involved. *See In re Gault,* 387 U.S. 1 (1967). The exclusionary rule is not here appropriate. *Contra, Knoll Associates, supra; NLRB v. Bell Oil & Gas Co.,* 98 F.2d 870 (5th Cir. 1938).

Even if we disregard the procedural context and its consequences, and focus on the applicability of the Fourth Amendment in terms of the intended "security to be afforded" the individual (the approach advocated by the Knoll's court, 397 F.2d at 535), we find, because of our initial determination, involving *Burdeau,* that the exclusionary rule is inapposite. The function of the rule is "to compel respect for the constitutional guarantee [of the Fourth Amendment] in the only effective available way—by removing the incentive to disregard it." *Elkins v. United States,* 364 U.S. 206, 217 (1959). There is no logic in excluding evidence to prevent the government from violating an individual's constitutional rights in a case when the government is not guilty of such a violation.

Respondent further argues that even if admission of the memorandum is not constitutionally forbidden, the use of such evidence is inconsistent with the National Labor Relations Act. The argument stresses the aim of the Act to foster "industrial peace"—an objective unlikely to be achieved, respondent insists, if labor and management are free to pilfer documents from each other in the hope of turning up evidence of unfair labor practices. But, of course, the Act is designed to achieve industrial peace only through application of the provisions contained therein—not to provide a broad authorization for any and all reforms which particular courts might deem helpful toward that end. Nor are employers or employees "free" to steal documents; civil and criminal remedies are readily available to deal with such conduct, and we have been provided with no persuasive evidence that those remedies are or will be ineffective.

Respondent cites *Hoosier-Cardinal Corp.,* 67 N.L.R.B. 49 (1946), suggesting that that decision represents a

Board determination that evidence obtained illegally should not be admitted in unfair labor practice proceedings. In *Hoosier-Cardinal, supra,* a union had refused to allow the Board to examine certain of its papers. Later an individual who was secretly working for a rival labor organization managed to be elected secretary-treasurer of the union and allowed a Board agent (accompanied by a representative of the rival organization) to examine and make photostatic copies of the papers in question. The Board held the copies inadmissible, explaining that

> "[i]t is better that there be a failure to take full advantage of such dubious opportunities than that Government, which 'teaches the whole people by its example, . . . should play an ignoble part.' As an administrative agency having both investigating and judicial duties, this Board must exact the highest standards of conduct from its investigating officers." 67 N.L.R.B. at 55 (footnote omitted).

It is not at all clear that *Hoosier-Cardinal, supra,* must necessarily be viewed as inconsistent with the Board's decision here. The Board agent in that case was aware of the official policy of the union in question and was directly and knowingly involved in the covert and apparently unauthorized copying of the documents sought. Regardless, however, of whether it is thought that such circumstances allow a satisfactory line to be drawn between the two cases, we conclude that the rule invoked here by the Board is correct: where the Board merely accepts and makes use of evidence illegally obtained by private individuals, exclusion of such evidence is not required by the Act.

II
REQUIREMENT TO BARGAIN

Respondent secondly challenges that part of the Board's order which requires it to bargain with the Guild. Its attack consists primarily of the contention that the Guild never represented a majority of its editorial employees. Fifteen of the twenty-five employees in the bargaining unit (as that unit was to be determined by the Regional Director) signed cards in April, 1965, authorizing the Guild to represent them, and it is on this foundation that the Board's bargaining order rests. Respondent argues, *inter alia,* that certain of the employees who signed cards did so on the basis of union misrepresentation concerning their effect, and that those employees intended merely to indicate their support for a Board election. A review of the record lends some support for this contention.

Authorization cards are a notoriously inaccurate method for determining employees' sentiment regarding a bargaining agent; it has been widely recognized that a secret Board election is by far the better method. The Board conceded that in certain circumstances where misrepresentation has occurred a signed card ought not to be taken as reflecting endorsement of the union in question as the signer's bargaining agent; however, it applied a standard under which a card's statement of authorization must be accepted unless union representatives assured the signer—explicitly, it would seem—that the card would be used "only for an election." Record, vol. 1, at 82. On the basis of this "only" rule, the

Board itself rejected one of the signatures, leaving fourteen, a majority, standing.[5]

This policy is consistent with the practice recently outlined by the Supreme Court in *NLRB v. Gissel Packing Co., Inc.*, 37 L.W. 4536 (June 17, 1969). There the Court resolved a conflict between the First and Fourth Circuits regarding the correctness of a bargaining order based on a card-evidenced majority where the employer has committed unfair labor practices tending to foreclose the holding of a fair election. The Court first ruled that a Board election is not the only method open to a union to establish a bargaining obligation, stating at 37 L.W. 4543 that

> "[t]he acknowledged superiority of the election process . . . does not mean that cards are thereby rendered totally invalid, for where an employer engages in conduct disruptive of the election process, cards may be the most effective—perhaps the only—way of assuring employee choice."

The Court then considered the effect of potential employee confusion generated by a single-purpose card, which states plainly that the signer designates the union his representative, which is presented by a union re-

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[5]The Board's approach, ratified by the Supreme Court in *N.L.R.B. v. Gissel Packing Co., Inc.*, 37 U.S.L.W. 4536 (June 17, 1969) *infra*, has been criticized by the First and Fourth Circuits. *See N.L.R.B. v. S.S. Logan Packing Co.*, 386 F.2d 562, 565-66 (4th Cir. 1967); *N.L.R.B. v. S. E. Nichols Co.*, 380 F.2d 438, 442-43 (2d Cir. 1967). We are aware of countervailing equities. Both the employer and the employee retain remedies if bargaining is required on the basis of card certification. Employees can petition for decertification if they are unhappy. 29 U.S.C. § 159 (c)(1)(B)(ii). The employee, if convinced there is no majority favoring a union, can petition the Board for an election. 29 U.S.C. § 159(c)(1)(B).

cruiter who promises that the card will be used in part "to get an election." The Court held that

> "employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election." *Id.* at 4544.

With this teaching of the Court before us, we turn to an evaluation of challenges made to the validity of proferred cards, being mindful of the Court's admonition that

> "[w]e . . . reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry." *Id.* at 4545.

There is considerable support for the conclusion that Erickson's card should have been rejected even under the test apparently applied by the Board. The trial examiner and the Board made the following findings with respect to Erickson:

> "Gillis solicited Erickson's card and told him about the Guild, the possibility of having it represent the employees in collective bargaining with Respondent and the possible benefits they could receive by joining the Guild. He told Erickson that the cards would bring about an election whereby all the employees could vote by secret ballot and determine through the election whether or not they

> wanted to be represented by the Guild and that he did not want Erickson to commit himself one way or the other at that time regarding his vote. Gillis stated that he wanted to get as many cards signed as he could and that this would show the Company that the employees were united and that they wanted better conditions; and the more cards, the better. He stated that the cards would all be kept secret, but that the total number would be sent by telegram to the Respondent." Record, vol. 1, at 81.

Erickson was not told that his card would be used for any purpose other than for securing an election, and in response to the question whether he was told that the card was *only* for an election, he stated, "Yes, he [Gillis] told me that in so many words." Record, vol. II, at 676. He also testified,

> "I was undecided at that time whether it was good or bad to have the Guild represent the employees, and I didn't know at that time how I wanted to vote. The whole thing was very new to me. I remember in the back of my mind that I certainly didn't want to commit myself at that time one way or the other for a vote. And when he assured me that the card was to call an election, why, I understood then that I could decide later which way I wanted to vote." *Id.* at 677.

The foregoing testimony demonstrates, we believe, that Erickson's cards should not have been accepted as establishing that he desired to be represented by the Guild.

We cannot come to the same conclusion with respect to Gray. The Board adopted the following findings of fact regarding Gray:

> "Gray's authorization card was solicited by Gillis. Gray had been a member of the Guild when employed by another newspaper. Gillis told him that he was trying to get signatures together to bring about an election for representation by the Guild, and that he thought all of the employees at Respondent would be better off with union representation, and he urged Gray to sign a card." Record, vol. 1, at 81.

Gray's case presents a much closer question than Erickson's, and we think that the above findings, viewed in light of the evidence supporting them, are consistent with the conclusion that Gray's card reliably indicated a desire for Guild representation. It is true, Gray stated that his sole intent in signing was to aid in bringing about an election. Record, vol. 12, at 747. The Board answers that Gray "read the card and knew that it could be used to obtain representation without an election." Brief for Petitioner at 36. The testimony on which the Board apparently relies in making this contention, is as follows:

> "Q. Didn't he say that if things went as well as they had been going, they would be sitting down at the bargaining table with Mr. Curry?
>
> "A. I believe he showed some optimism, as far as he was concerned in bringing about an election.
>
> "Q. You knew, didn't you, that Mr. Curry could capitulate and could just recognize the union without an election, didn't you know that?

"A. I believe I was aware of that." Record, vol. 12, at 742-43.

Thus, while a close question is presented on Gray's case, we cannot second guess the Board's conclusion that Gray's card can be accepted to establish his support for the Guild. This leaves a majority of thirteen cards, and is sufficient basis, therefore, for that part of the Board's order which compels respondent to bargain with the Guild.[6]

We recognize that the passage of time brought about by respondent's conduct may have cooled the organizational ardor that existed in 1965 or, indeed, may have seen the occurrence of substantial changes in the composition of the bargaining unit; but these difficulties are in some measure, the sort that inhere in any orderly system of adjudication, and are in any event not determinative.[7] Employee self-determination is, after all, the basic objective of the Act.

The Board's order will be enforced in both its aspects.

BYRNE, District Judge (dissenting in part):

I agree with the majority that that part of the Board's decision finding unfair labor practices by reason of interference with the election should be affirmed. However, that part ordering respondent to bargain should be reversed and a new election ordered.

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[6]There is some force to the board's contention that since respondent interfered with the free choice of its employees in the election, its challenges to reliance on authorization cards ill becomes it. However, the respondent has properly been found to have violated the Act in interfering with the election campaign and has been specifically prohibited from continuing such conduct.

[7]See *Gissel, supra* at 4547.

The union obtained fifteen signed authorization cards over the weekend of April 23-25, 1965. At the hearing before the trial examiner, the respondent questioned seven of those cards. The trial examiner determined that fourteen of the cards were valid. Using this number and the size of the unit, the trial examiner concluded that the union had a majority on April 26, 1965, and thus that the respondent could be ordered to bargain with the union. On review the respondent questions the determination of the trial examiner made with regard to five of the employees.

The trial examiner apparently followed the "only" rule established in the Sixth Circuit. *NLRB v. Cumberland Shoe Corp.*, 351 F. 2d 917. Under that rule it was held that an authorization card is valid to show representation unless the employer can show that solicitors represented to the employee that the "sole" or "only" purpose in signing the card was to obtain an election. A very mechanical interpretation of this rule was made which required that the actual words "sole" or "only" be used and so the court modified its rule. In the case of *NLRB v. Swan Super Cleaners, Inc.*, 384 F. 2d 609 (6th Cir. 1967), the court explained that no special words were necessary and that any card was invalid where representation had been made which conveyed the thought that the sole and only purpose of the card had been to obtain an election. The Board generally has followed those decisions in what has been recognized as the Board's *Cumberland* rule.

Subsequent to the Board's decision in the instant case, the Supreme Court decided *NLRB v. Gissel Packing Co. Inc.*, 37 L.W. 4536 (June 17, 1969). In *Gissel* the court held, "In resolving the conflict among

the circuits in favor of approving the Board's *Cumberland* rule, we think it sufficient to point out that employees should be bound by the clear language of what they sign unless that language is deliberately and clearly cancelled by a union adherent *with words calculated to direct the signer to disregard and forget the language above his signature.*" (emphasis supplied). The Court further admonished, "W agree, however, with the Board's own warnings in *Levi Strauss,* 172 N.L.R.B. No. 57, 68 L.R.R.M. 1338, 1341 and n. 7 (1968), that in hearing testimony concerning a card challenge, trial examiners should not neglect their obligation to ensure employees free choice by a too easy mechanical application of the *Cumberland* Rule."

The problem here is whether there has been "a too easy mechanical application of the *Cumberland* Rule". The trial examiner himself recognizing "words calculated to direct the signer to disregard and forget the language above his signature" rejected the card of Marx Ceder. He found that a union adherent had told Ceder that the card was to bring about an election and that the authorization language on the card meant nothing. Strangely, although he made similar findings with respect to other employees, he did not reject the cards of such employees.

The majority of this court adhering to the teaching of *Gissel,* follows the *Cumberland* doctrine and properly holds that the card of employee Erickson should not have been accepted as establishing that he desired to be represented by the Guild.

Applying the same test as the Board applied in the case of Ceder and the majority of this court applied in

Erickson, the cards of several other employees, particularly Cole and Gray, should also be invalidated.

Of paramount importance in determining the credibility of Cole and Gray, but apparently given little thought by the trial examiner, the Board, or the majority of this court, is the fact that the entire record clearly shows, and is not disputed, that the *original purpose in obtaining signatures on the cards was to bring about an election.*

The trial examiner found that even Rinehart, who was one of the two men assigned to solicit the cards from the other employees, when he questioned the language of the cards, was told by the Guild representative that the "cards indicate the employees are interested in the Guild and that they want an election", and when Rinehart was asked, "Did Mr. Schrader say at this meeting that one of the purposes of signing the card was to have the Guild as a bargaining representative without an election?", he replied, "I don't recall that, no." And so one of the solicitors was a man who, himself, believed that the only purpose of the cards was to obtain an election. The other solicitor was Gillis, who incidentally was the employee referred to in Part I of the majority opinion, who pilfered the document from the Editor's desk.

After reading the majority's discussion of Gray's situation, it is difficult to understand how it concluded that Erickson's card should be rejected but Gray's accepted. Both were solicited by Gillis and the misrepresentations were almost identical. Both were told the purpose of the cards was to obtain an election—both testified as to their reliance on the misrepresentations

and that their sole purpose in signing the card was to bring about an election.

It is interesting to note that the solicitation of Marx Ceder by Gillis follows the same pattern and is almost identical with that of Erickson, Cole and Gray. The trial examiner, while holding the misrepresentations made to Erickson and Gray did not warrant the rejection of their cards, concluded, "Cedar was asked to sign 'at least for an election' and 'simply to bring about an election'. Cedar was thereby induced to sign the card and I conclude and find that his card should not be counted." It should further be noted that the word "only" was not used during the solicitation of Cedar, Erickson, Gray or Cole. In short, the trial examiner did not apply "a too easy mechanical application of the *Cumberland* rule" to Cedar, but for some strange reason he did to Erickson, Gray and Cole.

With respect to Cole, the trial examiner found that Gillis specifically told him that he could disregard the authorization language as the sole purpose was to have an election. However, the examiner concluded that, because Cole testified that he was impressed by the solicitation, he probably would have signed anyway. This is not only irrelevant, since he in fact signed in response to the representation, but it is also unsupported by the evidence since there is no indication of what he might have done in the absence of the misrepresentations which the trial examiner himself said warranted rejection of his card. (R. 83).

I would reverse that part of the Board's decision ordering respondent to bargain and remand with directions to order a new election.

APPENDIX B.

Decision and Order of National Labor Relations Board

South Bay Daily Breeze, a Division of Southern California Associated Newspapers, Inc. and Local 69, Los Angeles Newspaper Guild, American Newspaper Guild, AFL-CIO, CLC

South Bay Daily Breeze, a Division of Southern California Associated Newspapers, Inc. and Los Angeles Newspaper Guild. Local 69, American Newspaper Guild, AFL-CIO, CLC, Petitioner. Cases 31-CA-119 (formerly 21-CA-6862) and 31-RC-18 (formerly 21-RC-9602). October 12, 1966

On May 13, 1966, Trial Examiner James R. Webster issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended that such allegations be dismissed. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Members Fanning, Brown, and Jenkins].

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[1]Respondent's undated motion to submit an additional exhibit (a telegram from the witness McDonnell to Respondent which was received after issuance of the Trial Examiner's Decision) purporting to show bias and unreliability on the part of McDonnell, is denied, as it presents nothing material that would affect our reliance upon the Trial Examiner's credibility findings.

The National Labor Relations Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.[2] The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings,[3] conclusions, and recommendations of the Trial Examiner.

[The Board adopted the Trial Examiner's Recommended Order.][4]

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

This case with all parties represented was heard before the Trial Examiner James R. Webster in Los Angeles, California, on January 18, 19, 20, 21, 24, 25, and 31 and February 1, 2, 3, and 28, 1966, on a complaint of the General Counsel and answer of South Bay Daily Breeze. A Division of Southern California Associated Newspapers, Inc., herein called Respondent

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[2]The authorization cards of certain employees, who were not called as witnesses by the General Counsel, were introduced into evidence by the testimony of other witnesses. Respondent sought to obtain, by means of a *subpoena duces tecum,* any statements in the Board's possession relating to the execution of these cards, but the Trial Examiner granted the General Counsel's motion to quash the subpena. We affirm this ruling, *Aero Corporation,* 149 NLRB 1283, 1288.

[3]Member Brown, for the reasons set forth in his separate statement in *Dan Howard Mfg. Co. and Dan Howard Sportswear, Inc.,* 158 NLRB 805, footnote 5, would find all the authorization cards, including that of Ceder, to be valid designations of the Union as the collective-bargaining representative of the employees in the appropriate unit.

[4]The address and telephone number for Region 31, appearing at the bottom of the notice attached to the Trial Examiner's Decision, is amended to read: Tenth Floor, Bartlett Building, 215 West Seventh Street, Los Angeles, California 90014, Telephone 688-5850.

or Company. The complaint was issued on October 19, 1965, upon a charge filed on July 27, 1965, and amended on October 5, 1965. The complaint alleges that Respondent has threatened, restrained, and coerced employees and has refused to bargain with the Union and has thereby violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, herein called the Act.

By order dated October 26, 1965, the Regional Director for Region 31 issued notice of hearing on objections in Case 31-RC-18 and an order consolidating said case with Case 31-CA-119. Hearing was directed on the objections to conduct affecting the results of the election filed by the Union on July 27, 1965.

Briefs have been filed by the General Counsel and by the Respondent and have been carefully considered. Upon the entire record and my observation of the witnesses, I hereby make the following:

FINDINGS OF FACT

I. The Business of the Respondent

Respondent is a corporation engaged in the publication and distribution of a daily newspaper entitled the *South Bay Daily Breeze* in Torrance, California. During the calendar year 1964, Respondent's gross income from the operation of this newspaper exceeded $200,000. Respondent utilizes national wire service dispatches and publishes advertisements of nationally sold products. During the calendar year 1964, Respondent received newsprint of a value in excess of $50,000 which was shipped to it directly from points outside the State of California.

Respondent is, and has been at all times material herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

Local 69, Los Angeles Newspaper Guild, American Newspaper Guild, AFL-CIO, CLC, herein referred to as the Guild or Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices and Objections to Election

A. *Prefatory statement and issues*

On April 21 or 22, 1965, Loel Schrader, an international representative for the American Newspaper Guild, received a telephone call from a member of the Guild that employees of Respondent were interested in that organization. A meeting was arranged for Friday evening, April 23, 1965. Three employees of Respondent's editorial department attended—Gary Gillis, Floyd Rinehart, and Alvin Butkus, and signed authorization cards that evening. Cards were distributed to Gillis and Rinehart for their use in soliciting signatures from other employees during the weekend. Schrader gave them copies of contracts that the Guild had with other employers, discussed advantages of Guild representation, and gave them information that would be useful in soliciting other employees. He told them that signatures on cards from at least 30 percent of the editorial employees were required before the Board would direct an election; that before the Guild would grant Schrader permission to seek bargaining rights, he needed cards signed by at least 70 percent of the eligible employees.

He told them how to compute union dues and that dues and initiation fees would be waived until there is a contract. I find that Gillis and Rinehart were key solicitors of authorization cards on behalf of the Guild.

On Sunday evening, April 25, 1965, Gillis and Rinehart turned over to Schrader 12 authorization cards they had solicited from employees in the editorial department. This gave Schrader a total of 15 cards. He then dispatched a telegram to Respondent, as follows:

> Editorial dept. employees of the South Daily Breeze have designated the Los Angeles Newspaper Guild as their representative for the purpose of bargaining collectively for improved wages, hour and other terms and conditions of employment. The Guild requests that it be granted recognition as bargaining representative for editorial dept. employees. In the event you do not voluntarily grant recognition the Guild will insist that a secret ballot election be conducted among all eligible employees by the National Labor Relations Board. The guild expects that the Daily Breeze will continue to act in a gentlemanly fashion and employees will not be impeded in their exercise of free choice by threats, interrogation or promises. In this regard the Guild calls your attention to appropriate sections of the labor management relations Act. Any attempts by the Daily Breeze to go beyond the proper bounds of pre-election conduct will be dealt with swiftly by the Guild's legal dept. The Guild's only concern is that eligible employees be given an opportunity to act, speak and vote in accordance with their own free consciences and without fear of retaliation from either party.

On Monday, April 26, Schrader filed a representation petition with the Board, and on the following day Respondent received notification from the Regional Office of the Board of this fact.

On April 27, 1965, Robert L. Curry, publisher and editor of Respondent, dispatched the following telegram to Schrader:

> In response to your telegram of April 26, I wish to advise you that the South Bay Daily Breeze declines to recognize your union as the collective bargaining representative of any of its employees because it genuinely doubts that your union represents a majority of its employees in any appropriate bargaining units. We further believe that the proper way to resolve these questions is through a secret ballot election conducted under the provision of the National Labor Relations Board provided you meet the requirements of the National Labor Relations Board for such an election.

On April 28, 1965, Schrader visited Curry, and told him that he represented the employees in the editorial department. He referred to a previous election that the Guild had had in the circulation department and suggested that they could avoid the bitterness and disruption of an election campaign by agreeing at that point to sit down and negotiate a contract. Curry replied that the matter has been turned over to counsel and was out of his hands and further that he doubted the Guild represented a majority of the employees. Schrader sug-

gested a quick election, but Curry did not accept the suggestion.[1]

A representation hearing was conducted on June 1, 2, and 3, 1965, at the Regional Office in Los Angeles, California. The Decision and Direction of Election issued on June 30, 1965, and the election was held on July 20, 1965. Thirteen votes were cast for the Union and 13 were cast against the Union with no challenged ballots.

The issues are (1) whether Respondent, by conduct and statements of Publisher Curry, Managing Editor Moon, News Editor Johnson, Agent Paffin, and Production Manager Wahlheim, during the period from April 26 to July 20, 1965, interfered with, restrained, or coerced employees within the meaning of Section 8(a)(1) of the Act; (2) whether the Guild represented a majority of employees in an appropriate unit on April 26, 1965; (3) if so, whether Respondent had a good-faith doubt as to the Guild's majority status; and (4) whether Respondent engaged in conduct between April 26 and July 20, 1965, that would warrant setting aside the representation election conducted on July 20.

Respondent contends, among other things, that (1) News Editor Johnson is not a supervisor within the meaning of the Act and that therefore Respondent is not chargeable for alleged statements by him; (2) the

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[1]In this conversation, as well as in other conversations where there are conflicts in testimony. I have carefully evaluated the conflicting testimony as to substance, logic, corroboration or lack of it from other evidence, and the demeanor of the witness, and I base my findings upon these considerations. In 1962, the Guild filed a petition with the Board seeking to represent Respondent's employees in the circulation department. A consent-election agreement was executed, and an election held; the Guild did not receive a majority of the votes.

unit sought to be represented by the Guild in April 1965, was inappropriate as it excluded three employees found by the Board to be nonsupervisory; and also Respondent had a sincere doubt as to the scope of an appropriate unit; and (3) employees were induced to sign authorization cards on representations that they could forget the printed statement on the cards and that the cards were solely to get an election, and also Respondent had a sincere doubt as to the Union's majority status. Respondent also contends that there has been no conduct or statements violative of Section 8(a)(1) of the Act or that would warrant setting aside the election.

B. *The alleged interference, restraint, and coercion*

1. By Kenneth Johnson, news editor[2]

On April 26, 1965, shortly after Respondent had received the telegram from the Guild, Johnson informed employee Gary Gillis of this fact and inquired of Gillis

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[2]Respondent contends that Johnson is not a supervisor within the meaning of the Act. The Regional Director in Case 31-RC-18 (formerly Case 21-RC-9602) found Johnson to be a supervisor within the meaning of the Act and excluded him from the appropriate unit. Section 102.67 of the Board's Rules and Regulations precludes relitigating this issue "in any related subsequent unfair labor practice proceeding." But the instant case involves more than the question of Johnson's supervisory status for inclusion or exclusion in a bargaining unit—refusal-to-bargain allegations being directly related to representation proceedings; it involves the question of Respondent's liability for unfair labor practices by the conduct or statements of Johnson if he is a supervisor within the meaning of the Act. I, therefore, permitted Respondent to offer newly discovered or additional evidence on the issue of Johnson's supervisory status. The issue of Johnson's supervisory status was fully and thoroughly litigated in the representation proceedings (Case 31-RC-18), the hearing having lasted 3 days. Respondent offered no significant new or additional evidence on this issue. Under the circumstances I am bound by the Regional Director's determination and will not consider the issue *de novo*. *Security Guard Service, Inc.*, 154 NLRB 8; *Rish Equipment Company*, 150 NLRB 1185.

if he was with him or against him. Gillis replied that he did not quite understand Johnson. Johnson asked him if he had signed a petition, and Gillis answered that he had not. Johnson told him that his father had been a union organizer and that he knew their tactics and that these things had turned him against unions in general. He told Gillis that he (Gillis) would not want to work there if there was a Guild; that it would ruin the paper.

Later the same day Johnson showed the telegram to employee Patricia McDonnell, women's editor, and asked if she were one of the people responsible for it. She read the telegram and replied that she was not. He stated that he felt it was a personal affront and that he had been stabbed in the back; that employees responsible for it were cowards and should have at least given him some warning that they were going to try to get the Guild in.

Approximately 1 week later McDonnell and Johnson had another conversation regarding the Guild. This conversation was after work and in a lounge known as the Lama Room near Respondent's building. She told Johnson that she was trying to keep a stand of neutrality in the matter, but that she would be tempted to vote for the Guild simply to protect employees Lorraine Geittmann, Gary Gillis, and Robert Jones. These employees were known to be Guild leaders. She stated that she knew how vindictive Curry and Johnson were, and that if the Guild were in, these employees would be protected. Johnson replied that if the Guild got it, that is when things would be tough on them. McDonnell asked, "How could it be, if they would be protected for six months after an election?" Johnson answered, "Well,

so the Guild gets in. Then you know how Lori [Geittmann] is late all the time. We just change her hours, and I will have her come in at 5:00 in the morning and you know how long it would take before Lori is being late. We could dismiss her after a week." As to Robert Jones, he stated, "You know what an old maid he is about his routines and his schedules; all we have to do is put him on a split shift, and he couldn't take that very long." On this occasion or on another occasion in the Lama Room about this same time, McDonnell asked Johnson how he could "get" everyone with so many employees, and, besides the outspoken ones, how would he really know who did vote for the Guild since it is a secret ballot. Johnson replied, "Now Patty we have ways; we have ways."

In another conversation in the Lama Room after work during the first several weeks following April 26, Johnson told McDonnell that she would have to have faith in Curry and in his statement that inequities would be met. McDonnell inquired as to how she could believe his promise since Managing Editor Moon had promised her a sizable raise after her first 6 months, which promise was not kept. Johnson stated that she would just have to have faith and that he could tell her what kind of salary she was going to make, but that he could go to prison if he told her. He stated he would write it down on a slip of paper and give it to her the next day. She did not receive the slip of paper or hear any more about the matter.

In the middle of May 1965, Johnson also told employee Eugene Hall that he was going to show him a slip of paper some time before the election indicating what his salary would be if the Guild were voted out.

A short time before the election Hall asked Johnson about the slip of paper and Johnson replied tha the did not have it at that time.[3]

In early June 1965, Johnson asked Hall to do him a personal favor and not attend the Guild meeting that night. Hall stated that he would not go, and he did not attend the meeting.

I find that by Johnson's interrogation of employees Gillis and McDonnell regarding their union activities, his statement to McDonnell threatening discharge of employees Geittmann and Jones in the event the Guild is voted in, his warning that Respondent had ways of piercing the secrecy of the Board election, and his promise to McDonnell and Hall of wage increases if the Guild is voted down, and his solicitation of Hall not to attend a Guild meeting after having promised him a wage increase. Respondent has thereby interfered with, restrained, and coerced employees within the meaning of Section 8(a)(1) of the Act. In the absence of a preceding promise or threat or other unfair labor practice, I would not consider a naked solicitation of any employee not to attend a union meeting as a violation of the Act.[4]

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[3]During the campaign Johnson prepared for Publisher Curry and other supervisors a list of employees with his evaluation of their stands on the Guild. As to Hall, he reported, "Sees dollar signs, thinks he's better and worth more than he is. Is very impressionable. Listens to me a lot, and a last minute promise of more money from me would weigh heavily on his decision. . . . He is the kind you worry about selling the day of the election."

[4]Based on the implications contained in Johnson's testimony (as for example, he testified that he asked Gillis about the Guild and that during the course of their conversation Gillis told him he was going to weigh both sides before making any decision; that he had 100 to 200 conversations with McDonnell and a similar number with Hall relative to the Guild; that every facet

(This footnote is continued on the next page)

2. By Robert L. Curry, publisher, Charles Wahlheim, production manager and consultant to publisher, and Robert Paffin, an agent for Respondent

In mid-May 1965, employee Patricia McDonnell had a conversation with Publisher Curry regarding another matter, and he asked her if she had any grievances or was unhappy about anything. She replied in the affirmative. She stated that she understood that Mary Brandvig, the women's editor for another newspaper with no employees under her, was earning $145 a week and she was earning only $120 a week and had two women working under her. Curry stated that he had been so busy with the construction of the new building that he had not been aware of how their salaries were lagging. He stated that he could assure her that once everything was cleared up, these inequities would be taken care of. He said that he knew there were some fence sitters and that she probably had not made up her mind as to how she would vote and he hoped that she would listen to his side of the story. She told him that she had already made up her mind: she stated, "You don't bite the hand that feeds you."

McDonnell had another conversation with Curry about June 21, 1965. She was called into his office

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of the Guild came up in his conversations with McDonnell, including changes that might be made in the working conditions of employees Geittmann and Jones and the secrecy of the ballot; that he considered it part of his job to keep a finger on the pulse of the situation and he wanted to make sure the boss knew that he knew a certain amount of things that were going on among the people; and that he made a list for the publisher and other supervisors showing his evaluation as to how the employees stood on the question of the Guild), the corroborative nature of the testimony of Gillis, McDonnell, and Hall, and my general observation of the witnesses, I credit the testimony as found herein and discredit Johnson's denials.

and he told her that Robert Paffin, an agent for Respondent, had been studying the salary structures at Respondent and that he (Curry) was now ready to do something about the inequities. He stated, "Now, I could go to prison for this, but I know you are one of us, and I feel I can trust you, Pat, and I want you to know, as of July 1, you will be receiving $15 more a week and you can be sure that after this thing is settled, that your salary will be equal or comparable to Mary Brandvig's." On June 28, 1965, McDonnell's salary was increased $15 per week.

In mid-May 1965, employee Eugene Hall went to see Curry regarding Curry's cosigning a banknote for him. During the course of the conversation, Curry asked Hall how he stood "in this Guild thing?" Hall replied that he was 100 percent with the Company. Curry replied that that was good and that he was going to know how people were going to vote and that if the Guild did win the election, promotions would go to people who voted against the Guild, because he would want people who were true to the Company to negotiate with the Guild for contracts. He told Hall that he had to beat the Guild and would appreciate anything Hall might do for him that would help him defeat it. Hall, on his own and in an effort to comply with this request, supplied Curry a few days later with a list of employees and how he thought they would vote. This list was given to Curry's secretary for transmittal to Curry. In the conversation Curry told Hall he had talked to Supervisor Moon and Johnson and that Hall had a tremendous future with Respondent, and told Hall that the only reason he was agreeing to the loan was that he had been told that Hall had great possi-

bilities and was a good reporter, and was going to be with Respondent for a long time.

On the day of the election Curry asked Hall to have coffee with him. He told Hall that he understood that Union Representative Schrader was at his house the night before and that Hall had called Schrader the day before. He told Hall that Johnson and Moon were worried that Hall was going to vote against the Company, and that he (Curry) felt sure that Hall was merely stringing along with the Guild to supply Curry further information. Hall replied that this was true, but he testified that he in fact was not stringing the Guild along.

Curry held staff meetings with employees in the editorial department on June 10 and 22 and July 14 and 16, 1965, to discuss the Guild.

He told them that he was very shocked to be notified that his employees had taken action resulting in the petition filed with the Board seeking Guild representation; that he thought they were a family group and that his door had always been open to any one that had any complaints, and that perhaps in the past year he had been a poor employer because he had been so involved in the construction of the new plant and was not aware of the complaints within the department; that he has become aware there were inequities and that they would be rectified, but he could not give them specific details because he did not want "to end up in jail"; that he and Managing Editor Moon and Executive Editor Samuel Stewart had gone over the specific things that would be done to eliminate the inequities. He assured them that there would be no firings because of the Guild.

At the meeting of June 10, Charles Wahlheim, production manager and consultant to the publisher and a supervisor within the meaning of the Act,[5] stated that where there is a union contract, rules and regulations have to be strictly followed, but where there is no union contract, more laxity exists. He told them of an example in the stereotype department (where Respondent has a contract with the International Stereotypers Union) of a long-term employee, who, through no fault of his own, spilled some hot metal on his foot and was off work because of this for a considerable period of time. Wahlheim pointed out that this employee received no sick or disability benefits from Respondent because there was nothing in the contract covering sick leave; that Respondent was "unable to help this man, as much as we wished to, being a long-term employee and ex-foreman, because of setting a precedent that maybe at a later date some other employee whom we may not feel quite the same about and who may have an entirely different set of circumstances that we weren't aware of, and then this being set as a precedent, we could be required to pay sick leave for the second hypothetical case, having established a precedent with the first gentleman, of giving him sick pay."[6]

In connection with the remarks of Wahlheim, Curry stated that as things were then in the editorial depart-

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[5]On July 13, 1965, Wahlheim's position was changed from production manager to consultant to the publisher in labor relations matters and production matters. In both positions he negotiated and administered contracts with labor unions representing employees of Respondent. Respondent has contracts with the International Typographical Union covering printers, with the International Stereotypers Union covering stereotypers and with the International Pressmen Union concerning pressmen.

[6]Employees in the editorial department currently may take 2 weeks of sick leave.

ment, if an employee came to work drunk, the Company probably would give him a break if he were a reasonably good employee. He stated that the Guild would cause management to be on one side and the employees on the other and would end the family feeling that has existed, and that it might take 6 months to negotiate a contract. Curry told them that if they were under a Guild contract and an employee were tardy three times, Respondent would have to fire him, because if it did not, it would be setting a precedent and would not thereafter be able to fire anyone for being tardy.

In this connection Wahlheim told the employees of a situation that had recently occurred in the stereotype department where an employee had wanted to take a day off and had called a substitute to cover his position. On the day involved the substitute did not show up; a few minutes after 6 a.m., the starting time, the foreman called the president of the Stereotypers Union and told him about it; this person in turn called the employee who had planned to take the day off and told him he could lose his job if his position were not covered. The employee then rushed to work without taking time to dress fully.

Wahlheim testified that he wanted to make it clear to the employees in the editorial department that in departments represented by unions Respondent rigidly adhered to the contract and company rules, not because Respondent wanted to in all cases, as "in the case of this ex-foreman we personally felt badly about the situation," but because Respondent was fearful of setting a precedent of leniency if rules were not strictly enforced for all employees, and then be faced with this precedent in a subsequent arbitration of a similar situation.

In the latter part of June 1965, Curry asked employee Peterson to have lunch with him. At the restaurant Curry stated that it was probably evident why they were there. He stated that he was not going to ask Peterson to vote for the Company, but that he wanted and needed his vote. He stated that he did not understand why a person with Peterson's background would want to have the Guild because it is something for people who need a crutch and who cannot get anywhere on their own. Curry stated that with the Guild they would have regimentation; that the Guild would run the show and would take over. He told Peterson that his recent wage increase had nothing to do with the Guild. He also stated that newspaper companies check with one another on applicants. He stated, "We also check whether you had any Guild leanings, and a lot of publishers do not like to hire people that had Guild leanings, you know, and this may go bad with you."

About 2 weeks before the election, Curry asked employee Inez Staff to have coffee with him. He told her that he was very disturbed by "all this Guild fuss" and that he realized that it had a very disrupting influence on the employees; that he had been a very busy man with the new building; that he realized there were inequities but that he meant to see that they were corrected. He stated that he hated to see the Guild get in because the editorial department had always had a good family relationship and that the Guild would destroy this. He also stated, "Well, you know, we publishers have our organization, too, and if any of those young fellows try to get a job and he has been active in trying to get the Guild in here, we publishers have our own

ways of letting each other know that he just wouldn't be a desirable fellow to hire."

In mid-June 1965, Curry called employee Gillis into his office, and told him that he wanted to have a chat with each of the employees, as he had mentioned in a staff meeting. He told him that there were certain things he could not discuss which would be illegal. He stated he did not question Gillis' part in the Guild, but that the Guild is an irresponsible union and he would show him proof as to why he should change his mind. He told him that Guild or no Guild, raises would be given as part of their salary review, and that after the election there would probably be other raises. He stated there were inequities that had been brought to his attention and that they would be taken care of.

On about July 13, 1965, Agent Robert Paffin told McDonnell one evening at the Plush Horse Restaurant that he had worked many years on the side of unions in New York and had worked many years on management's side, and that if the Guild got in, he would participate in contract negotiations, and stated, "I know every trick in the book, and we will hold this up for one year, until another election is due."

I find that Respondent has interfered with, restrained, and coerced employees by Curry's promises to employees during the election campaign that salaries would be increased and "inequities" rectified, his interrogation of employee Hall, his statement to Hall that he was going to know how people were going to vote and that if the Guild did win the election promotions would go to people who voted against the Guild, and his statement to him that he knew of Hall's telephone call to Union Representative Schrader and of Schrader's visit

to his residence the night before the election, giving the impression of surveillance,[7] and his threat to employees Peterson and Staff constituting blacklisting. I find insufficient evidence of any statement by Curry of an intent to refuse to bargain with the Guild, as the representative of employees of Respondent, or that he made any solicitation of an employee to engage in surveillance; I shall therefore recommend that paragraphs 12(b) vi and x of the complaint be dismissed.

Both Curry and Wahlheim warned employees that with the Guild there would be regimentation and adherence to rules whereas without the Guild laxity is permitted. Without a union an employer has flexibility in his dealings with his employees; preferential treatment can be accorded some employees and denied to others. Unions usually seek to standardize treatment of employees in accordance with some objective criteria. Thus, working rules or practices evolve or are promulgated. This is a concomitant of unionization, and an employer may advise employees of that fact. But, on the other hand, it would be improper for an employer to threaten that rules would be administered without "heart" or regard for equity considerations or reasonable excuses and to infer that rules would be used to do injury to employees rather than to bring about fair and equal treatment.

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[7]Employee Geittmann testified that Curry told her in one of their conversations that he had heard she was campaigning for the Guild. In view of the fact that she openly campaigned for the Guild and that it was commonly known she was a Guild supporter, I find that Curry's statement to her does not constitute illegal surveillance or impression of surveillance.

The issue here is whether Respondent said that with a union there would be rules and rule adherence, a normal concomitant of unionization, or whether it informed employees that rules would be heartlessly administered. Respondent mentioned a rule existing in another department to the effect that three tardinesses result in discharge. There are employees in the editorial department, Geittmann and McDonnell in particular, who have been tardy a number of times and who, because of their habits, would find it difficult to comply with this rule. I do not consider it improper for an employer to advise or warn employees of direct consequences and concomitants of unionization as long as his remarks are not improperly out of perspective. But, in the instant case there is evidence that Respondent warned that the rules would be administered and used vindictively. Managing Editor Moon stated that the Guild would take the heart out of the employer-employee relationship. News Editor Johnson told McDonnell that the starting hour of Geittmann could be changed to where her proclivity for lateness would cause her to violate the rule. In a written report submitted by Johnson to Curry giving his appraisal of employees' feelings on the Union, he suggested that employee Randy Gray, whom he reports has been "goofing badly," might be convinced to vote for the Company with the selling point that "Guild rules will cost you your job." Wahlheim told of instances of strict application of rules in situations where hardship resulted. I therefore find that remarks in this vein by Curry and Wahlheim, as well as Johnson and Moon (paragraphs B, 1 and 3 of this Decision), threatened that working rules would be heartlessly and vindictively administered, and I find that

this constitutes a violation of Section 8(a)(1) of the Act.[8]

I find that Respondent also violated Section 8(a)(1) and (5) of the Act by Paffin's threat to employee McDonnell that bargaining would be held up and delayed until another election could be conducted.

3. By John C. Moon, managing editor

The representation hearing in Case 31-RC-18 was scheduled for June 1, 1965, at the Regional Office in Los Angeles, California. However, prior to the scheduling of the hearing for Los Angeles, there was discussion and consideration of the setting of the hearing in Torrance, California, near the offices of Respondent. The Guild subpenaed 13 persons from the editorial department—there being 25 employees in the appropriate unit. For this number of employees to be absent at one time from that department, adding the loss of time involved in travel between Torrance and Los Angeles, it would have been exceedingly difficult, if not impossible, for Respondent to have gotten out a newspaper for the day. The subpenaed employees were not advised of a last minute agreement between the Guild and Respondent for the scheduling of their appearance as wit-

[8]On credibility, there is substantial accord in Curry's testimony with that of McDonnell except that he denies that her wage increase and the correction of inequities is related to the Guild. Curry denies significant portions of the statements attributed to him by Hall. Due to the general tenor of Curry's testimony, the corroborative testimony of other witnesses to his statements and my observation of the witnesses, I credit, the testimony as found above and discredit Curry's denials. As to Hall, he admitted that on occasions he has made untrue statements where it served his purposes, but under strenuous cross-examination, he impressed me by his straightforwardness, demeanor, and truthfulness on the witness stand and for the most part his testimony is corroborated in substance and tenor by other witnesses.

nesses. On May 31, Moon, a supervisor within the meaning of the Act, after consultation with Publisher Curry and Respondent's attorney, was directed to call each of the subpenaed employees and advise them to report to work on June 1, and that they would be sent to the hearing as they were summoned. During the 3-day hearing, six nonsupervisory employees testified. I find that under the circumstances Moon's urging and direction to subpenaed employees to report for work on June 1 did not constitute a violation of the Act, and I shall recommend that paragraph 12(c) ii of the complaint be dismissed.

During Moon's telephone conversation with employee Gillis on the evening of May 31, he stated that if the Guild got in at Respondent, it would have rules that the Company would have to abide by; one was that if a person is tardy three times, the Company would have to fire him. He mentioned that employee Geittmann had been tardy on many occasions. He stated that the Company has a lot of heart and the Guild would take this away.

In mid-June 1965, while Gillis and several employees and Moon were having coffee in the coffeeroom at Respondent, the Guild was discussed. Moon suggested that they could form their own union and not have to pay dues, and he suggested a suggestion box on the wall in which employees could put their complaints or suggestions; he stated he felt that this would solve many of the problems that existed rather than through the Guild. He told them that their salaries would be reviewed in June and that they were all going to get raises and that after the Guild was defeated they would continue to receive raises.

In the latter part of May 1965, employee Geittmann had a conversation in Respondent's coffeeroom with Moon in which her participation in the Guild campaign was mentioned. She was one of the senior employees in the editorial department and was openly active on behalf of the Guild. Moon had known Geittmann for approximately 9 years and was concerned about her physical reaction to the campaign. She testified that she was nervous and worried, Moon had observed this and told her he was worried about her and that he did not want her to get hurt—that he did not want anything to happen to her because of the Guild campaign.

In early May 1965, Moon stated to employee McDonnell that employee Erickson had a fine career ahead of him and that it would be too bad if he gets mixed up with the Guild because anyone who has been a Guild agitator or a Guild supporter would never get into a managerial position, and that this was the case at the Copley newspaper in San Diego, California, where the Guild is bargaining agent for employees. McDonnell stated that she disagreed with him on this as it was her understanding that the city editor in San Diego had been an officer of the Guild. He denied that this was true and the conversation ended.

In the latter part of May 1965, McDonnell had another conversation with Moon in which the Guild was mentioned. McDonnell was late to work one morning and Moon called her into his office. He reprimanded her because of her lateness and told her that if the Guild and the Federal Government were not breathing down his back, he would fire her at that time, and he told her of another employee, Randolph Gray, whose

termination had been recommended but who had not been terminated because of the pendency of the Guild matter. He handed her a letter about her tardiness that morning, and told her this was evidence or proof that she had been late, and stated that if the Guild got it, "three times late, Pat McDonnell, and you will be out on the streets." McDonnell testified that she has frequently been late to work.

In a conversation in mid-June 1965, Moon told McDonnell that she was the first professional newswoman that he had ever hired as a women's editor and that since she has been there the salary of the women's editor has been increased from $100 a week to $120 a week, but that since the Guild agitation had started, they were going to have to make all the salaries at Respondent comparable to other newspapers of the same size, and therefore he would be paying the women's editor $165 or $170 a week. Then he stated, "Therefore, Pat, you make one slipup, and you will be out, because I can hire anyone I want to at that kind of money."

A week or two before the election of July 20, Moon told McDonnell that there were five or six of the employees, including her, who were fence sitters. He stated he could not understand why they did not stand up and say whether they were for or against the Guild, or how they were going to vote. Moon brought the matter up on several occasions.

On July 20, 1965, shortly before the election, employee Hall told Moon that in his opinion if the Guild won the election it would be the fault of News Editor Johnson as he had antagonized and upset people and they would vote against the Company because of John-

son. Moon replied to this and also told Hall that if the Guild won the election, Hall would be fired, Randy Gray would be fired, and Lori Geittmann would be fired.[9]

About 3 weeks before the election, employee Robert Peterson was in the coffee room of Respondent and Moon called him over to his table. Moon asked him, "What is this I heard about you being pro-Guild?" Peterson denied it, and Moon stated that he had heard Peterson was for the Guild. Peterson asked who had told him this. Moon replied that a number of employees were compiling lists of those for the Guild and those against it, and that everyone who had checked in with him had reported that Peterson was pro-Guild. He asked Peterson, "How come you have not approached me on this Guild thing? You are the quietest fellow in the house." They then discussed Peterson's goals and his future. Moon told him that if the Guild gets in, they lose the closeness in the Company. He told him that if he wanted to go to another paper for a job, the other paper would probably want to know his background, and if they found out that he had guild leanings, they might not want to hire him; that newspapers keep in contact with each other regarding job applicants.

I find that Respondent interfered with, restrained, and coerced employees in violation of Section 8(a)(1) of the Act by Moon's threat to Gillis and McDonnell of stringent application of working rules if the Guild came

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[9]In context with other testimony, Moon was inferring that with the Guild as bargaining representative, working conditions would become more stringent, which, in turn, would bring about the discharges of these employees.

in, his threat to Hall that certain named employees would get fired as a result thereof, his promise of a general pay raise, his threat to McDonnell that Guild supporters would never get into managerial positions, his repeated interrogation of McDonnell urging her to say whether she was for or against the Guild, his interrogation of Peterson and threat to him to inform other prospective employers of an employee's guild leanings as a basis for interfering with his future employment, and his statement to Peterson regarding reports and lists he has received from other employees, giving the impression of surveillance. I find that Moon's statement to Geittmann that he did not want to see her get hurt because of the guild campaign was motivated by a concern for her health and did not constitute a threat of reprisal action by Respondent.

C. *The appropriate unit and majority issue.*

Following the representation hearing in Case 31-RC-18, the Regional Director for Region 31 issued a Decision and Direction of Election finding that the appropriate unit included all editorial department employees at Respondent's Torrance, California, plant, including the librarian, and excluded all other employees, parttime contract reporters, guards, watchmen, and supervisors as defined in the Act. Concerning the eligibility of certain employees, the Regional Director found, contrary to the contention of the Guild, that Sports Editor Richard White, Women's Editor Patricia McDonnell, and Chief Photographer Robert Moore were not supervisors within the meaning of the Act; and the Regional Director found, contrary to the contention of Respondent, that City Editor Jay Berman, News Editor Kenneth Johnson, and Assistant News Editor Gary Palmer

were supervisors within the meaning of the Act. Respondent contended in the representation hearing that all six of the above-named persons were nonsupervisors, and the Guild contended that all were supervisors within the meaning of the Act.[10]

The parties stipulated that there were 25 named employees on April 26, 1965, in the unit found appropriate by the Regional Director, and that these same employees were employed on July 20, 1965. On April 23 through 25, 1965, 15 of these employees signed authorization cards designating the Guild as their bargaining representative. Each of these employees, except Al Butkus, identified his authorization card. The card of Butkus was identified by Schrader, in whose presence the card was signed on April 23, 1965. Respondent contends that certain of the cards should not be counted as valid designations of the Guild as bargaining agent because of the nature of the representations made to employees when they were induced to sign them. Cards questioned were those signed by: Robert Peterson, reporter; Floyd Rinehart, reporter; Marx Ceder, Sunday editor; Randolph Gray, reporter; Richard Baylor, night editor; Charles Cole, reporter; Donald Erickson, reporter.

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[10]Respondent sought to relitigate in this proceeding the issue of the appropriate unit. Pursuant to Section 102.67 of the Board's Rules and Regulations a party to a representation case is precluded from relitigating in any related subsequent unfair labor practice proceeding any issue which was, or could have been, raised in the representation proceeding. I also reject Respondent's contention that this section of the Board's Rules and Regulations, and the authorities binding me to follow Board determinations in representation cases, do not apply in the instant case on the grounds that the refusal to bargain is alleged to have commenced at a time prior to the Board's unit determination.

Robert Peterson: Gillis solicited the card of Peterson. He told Peterson that if he signed the card they could get the Guild to represent them and the more cards they got, the better off they would be. He stated that Publisher Curry could "go along with it," but they knew he would not do this; therefore, "we are going to get an election." He told Peterson, "Now, this does not mean that you have to vote for the Guild, just because you sign a card," and he told him that the cards would not have to be shown to the employer. Peterson asked if the employees would lose all control over their working conditions and would the Guild "run the show" if it became their bargaining representative. Gillis replied, "No, the Guild will only represent us; that we decide what kind of wage increase we want, we decide what kind of working conditions we want."

Floyd Rinehart: Rinehart, who was one of the three employees who first met with Union Representative Schrader and who solicited other employees to sign authorization cards, asked Schrader at the first meeting whether these cards constitute an immediate application to the Guild as dues-paying members. He replied that they were not members at that moment, but that the cards indicate the employees are interested in the Guild and that they want an election; that if the election is successful for the Guild, then the employees who signed would be members.

Marx Ceder: The card signed by Ceder was given to him by Gillis, Gillis told him that he and Rinehart were getting signatures of editorial employees in order to call an election, and if they obtained a majority of signatures, they could turn these cards over to the

Board, which would then serve notice on Respondent that an election would be called. Ceder called Gillis' attention to the wording on the card, and Gillis told him that the language on the card meant nothing beyond the fact that an election would be called. Ceder was hesitant to sign the card and stated he wanted to talk with other employees before signing the card. Gillis told him, "Well, if you don't want to be represented, then give us the chance to be represented, if not at least for an election." Gillis left a card with Ceder. On the next day Rinehart talked to Ceder on the matter. Ceder asked him if the card constituted membership in the Guild. Rinehart replied that it did not that it was his understanding that it was simply to bring about an election, and if the election was successful from the Guild's standpoint, then it would constitute an application for membership. On these representations Ceder signed an authorization card.

Randolph Gray: Gray's authorization card was solicited by Gillis. Gray had been a member of the Guild when employed by another newspaper. Gillis told him that he was trying to get signatures together to bring about an election for representation by the Guild, and that he thought all of the employees at Respondent would be better off with union representation, and he urged Gray to sign a card.

Richard Baylor: Rinehart solicited Baylor's card and talked to him about the situation at Respondent and stated that some of the employees had gotten together and decided to see if the Guild could straighten the situation out; he explained that the Guild needed a certain percentage of signatures of the employees in the editorial department in order to file a petition with the

Board requesting an election. He asked Baylor to sign and he did.

Charles Cole: Gillis solicited Cole's card. After reading the printed matter on the card, Cole asked Gillis if he would be committing himself to vote for the Guild. Gillis replied, "Forget it;" that it would not commit him to vote for the Guild or commit him to the Guild. Gillis [Cole] stated that Gillis made a pretty good argument for the Guild, and when he left he was pretty well sold on what they were trying to do. Cole filled out the back side of the authorization card, indicating that he would be interested in serving on the negotiating committee for the Guild and the legislation committee, although Gillis told him it was not necessary for him to fill out this side of the card. Cole had been a member of the Guild on a prior occasion when employed by another newspaper. During part of the campaign, Cole was active on behalf of the Guild.

Donald Erickson: Gillis solicited Erickson's card and told him about the Guild, the possibility of having it represent the employees in collective bargaining with Respondent and the possible benefits they could receive by joining the Guild. He told Erickson that the cards would bring about an election whereby all the employees could vote by secret ballot and determine through the election whether or not they wanted to be represented by the Guild and that he did not want Erickson to commit himself one way or the other at that time regarding his vote. Gillis stated that he wanted to get as many cards signed as he could and that this would show the Company that the employees were united and that they wanted better conditions; and the more cards, the better. He stated that the cards would all be kept

secret, but that the total number would be sent by telegram to the Respondent.[11]

Conclusions on questioned cards: Case precedent establishes that a union may, under certain circumstances, acquire the status as a bargaining representative by a count of authorization cards signed, and without an election. Of course, a secret ballot is the most accurate method of ascertaining the true desires of the employees, and this method is encouraged by Board decisions. Normally an employer may refuse to rely on a count of authorization cards and insist upon a secret ballot,[12] and both the employer and the union may campaign for the votes of the employees. Employees who signed cards and those who did not may change their minds by the time the election occurs. This procedure, however, contemplates campaigning free from intimidation and coercion; otherwise it would not result in a free and accurate tally of the true desires of the employees. Where intimidation and coercion of a nature that destroys the "laboratory atmosphere" occur, the Board examines an employer's "good faith" in questioning a union's majority status, and generally good faith is

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[11]Erickson testified he could not say that Gillis told him the card was "only" for an election, although he said Gillis told him "that in so many words"; but he testified that by the words used by Gillis he was "lead to believe" the sole purpose of the card was an election.

[12]*Hammond & Irving, Inc.*, 154 NLRB 1071; *Oklahoma Sheraton Corporation*, 156 NLRB 681; *John P. Serpa, Inc.*, 155 NLRB 99. However, once he has checked the cards and started bargaining, the Board found bad faith in *Jem Mfg., Inc.*, 156 NLRB 643.

found to be absent where unfair labor practices have occurred.[13]

Since, under these circumstances, a secret ballot would not be a reliable reflection of employees' true desires, a count of the authorization cards is utilized to ascertain these desires. Of course, the Board could order a new election following the posting of a notice of non-interference; but in practice that remedy may not altogether remove the effects of the intimidation and restore the status quo; and where an election has been conducted under circumstances of intimidation, it may be negated and majority status determined by a count of authorization cards.[14]

An authenticated signature on an authorization card is *prima facie* evidence that it is what it purports to be—a designation of the union as the employee's bargaining representative, unless it is shown that the employee was induced to sign the card through beguilement or serious misstatement of fact. Evidence to vary the written and unequivocal designations by the employees on an authorization card is strictly construed, and the Board has held that representations that the card is "to get an election" is not a false representation or a misstatement of fact, but that a representation that the

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[13] *Joy Silk Mills, Inc.*, 185 F.2d 732 (C.A.D.C.), and cases following this decision. But in *Strydel, Inc.*, 156 NLRB 185, the Board found no bad-faith refusal to bargain although interferences violative of Section 8(a)(1) of the Act were committed. These were not of such serious nature as to warrant finding that they were designed to dissipate the union's majority status. Also see *Ben Duthler, Inc.*, 157 NLRB 69.

[14] *Bernel Foam Products Company*, 146 NLRB 1277; *Irving Air Chute Co., Inc.*, 149 NLRB 627.

card is "only for an election" is a misstatement of fact.[15]

It was, of course, the intention of the Guild, in the absence of the possibility that voluntary recognition could be obtained, to have an election. It was Respondent's unfair labor practices that destroyed the reliability of an election and brought about the need to use a card check as a substitute. Thus, in consideration of this fact, the objective of giving impetus to the true desires of the employees as nearly as they can be ascertained under the circumstances, the policy of the Act "to encourage collective bargaining," and the reluctance in law to vary a written document by parol evidence, the signed designation of the Guild as bargaining agent is deemed to constitute just that, irrespective of what an employee thought or was led to believe because of the emphasis placed on an election by the solicitor and his failure to mention any other purpose of the card, as long as the solicitor does not make a significant false statement or misstate a fact and expressly say that the card's *only* use is for an election or say that the card has *no other* purpose. A person who commits himself to sign a clear and unequivocal document is deemed to have some responsibility for his act.

I find no misstatement of fact or beguilement warranting rejection of cards because of representations made to Peterson, Rinehart, Gray, Baylor, or Erickson. However, such statements were made to Cole and Ceder. Cole was told to forget the language on the

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[15] *Conren, Inc.*, 156 NLRB 592; *Gotham Shoe Manufacturing Co.*, 149 NLRB 862, enfd. 359 F.2d 684 (C.A. 2); *Engineers & Fabricators, Inc.*, 156 NLRB 919; *General Steel Products, Inc.*, 157 NLRB 636.

card; Ceder was asked to sign "at least for an election" and "simply to bring about an election." Ceder was thereby induced to sign the card and I conclude and find that his card should not be counted. Cole, on the other hand, was not induced to sign the card by the above-quoted statement. He testified that he was pretty well sold on what they were trying to do and he also expressed on the card his willingness to serve on committees of the Guild. I conclude that his card should be counted as a designation of the Guild.[16] The Guild, therefore had 14 valid authorization cards on April 26, 1965.

As to the unit, Respondent contends that its question of appropriateness of unit is in good faith since the unit found appropriate by the Regional Director in Case 31-RC-18 was different than that contended for by either Respondent or the Guild. The difference of opinion, however, was not so much as to the scope of the unit as to the eligibility of certain employees—whether they were supervisors or nonsupervisors. On the Guild's majority status, Respondent bases its doubt on (1) the fact that on a prior occasion the Guild claimed to represent a majority of employees in another unit but lost in an election; (2) in the representation petition in Case 31-RC-18 the Guild represented that the unit consisted of 20 employees, whereas the Regional Director found appropriate a unit of 25 employees, and Respondent contended that it contained 28 employees; and (3) no employees came to the publisher with any complaints. Respondent also contends that Schrader did not use the word "majority" in his telegram of April 25 or 26, 1965, requesting recognition nor in his conversation

[16] *Engineers & Fabricators, Inc., supra.*

with Curry on April 28, whereas the word was used by the Guild in its telegram concerning the circulation department on the prior occasion. Although the word "majority" was not used by Schrader in the instant situation, he did claim to have been designated by the "editorial dept. employees" as their representative. I reject Respondent's contentions, and based on the extent and nature of Respondent's unfair labor practices found herein to have occurred between the dates of the filing of the petition and the election, I find that Respondent's doubt on the unit and the Guild's majority status was not in good faith.[17]

D. *Pay raises*

During the several years prior to 1965, Respondent has had a policy of reviewing performance and wages of employees in the editorial department about every 6 months and granting wage increases where warranted. The reviews and recommendations are made by Managing Editor Moon and are approved or disapproved by Publisher Curry. In June 1965, these reviews resulted in wage increases for 24 of the 25 employees in the appropriate unit—Sports Editor Richard White being the only employee not to receive one. Normally, all employees do not receive increases at each review, although in the second half of 1963, all but approximately three employees in the editorial department received wage increases.

In News Editor Johnson's written report during the election campaign to Publisher Curry and other super-

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[17] *Gafner Automotive & Machine, Inc.*, 156 NLRB 577; *Southland Paint Company*, 156 NLRB 22; also see *United Aircraft Corp. (Hamilton Standard Div.) v. N.L.R.B.* (C.A. 2), 56 LRRM 2678, cert. denied 58 LRRM 2496.

visors as to his appraisal of employee positions on the Guild, he repeatedly suggested that a raise in pay would sway employees away from the Guild. As to employee Jim Cole, he reported that "Money is the key"; as to employee Charles Cole, he reported "He can be won with money"; as to employee Don Erickson, he reported "Like Chuck Cole, said he wants to see what the pay changes would be"; as to Eugene Hall, he reported that "a last minute promise of more money from me would weigh heavily on his decision"; as to Lloyd Rinehart, he reported "Is more concerned with a future with money than just a future."

In view of the fact that I have found herein that Respondent did not have a good-faith doubt as to the Guild's majority status, has committed unfair labor practices in an effort to dissipate its majority, and has refused to recognize and bargain in good faith with the Guild since April 26, 1965, I conclude and find that Respondent violated Section 8(a)(1) and (5) by granting wage increases to employees on June 28 and July 1, 1965, without consultation and bargaining with the Guild and by doing so for the purpose of interfering with, restraining, and coercing employees in the pending representation election.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

Upon the basis of the findings of fact and the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 69, Los Angeles Newspaper Guild, American Newspaper Guild, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating employees regarding union activities, threatening discharge of employees because of their union activities, promising wage increases and rectification of inequities, and granting wage increases to discourage union activities, soliciting an employee not to attend a union meeting under circumstances as occurred herein, giving employees impression of surveillance of union activities, threatening employees with a stringent and heartless application of work rules if represented by the Union, and threatening employees with lack of opportunity for promotion to managerial positions and blacklisting because of their union activities, Respondent thereby has engaged in unfair labor practices as proscribed by Section 8(a)(1) of the Act.

4. By engaging in unfair labor practices as described in paragraph 3, Respondent engaged in conduct which improperly affected the results of the election on July 20, 1965.

5. All editorial department employees at Respondent's Torrance, California, plant, including the librarian and excluding all other employees, part-time contract reporters, guards, watchmen, and supervisors as defined

in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. The Guild has been at all times since April 26, 1965, the exclusive representative of all employees of Respondent in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

7. Commencing on April 27, 1965, and continuously thereafter, Respondent has refused to recognize and to bargain collectively with the Guild in June 1965, unilaterally granted wage increases to employees, thereby violating Section 8(a)(5) and (1) of the Act.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. Respondent did not engage in unfair labor practices within the meaning of Section 8(a)(1) of the Act nor did it improperly affect the results of the representation election as alleged in paragraphs 12(b) vi and x, 12 (c) ii, 12 (f), and 12 (g) of the complaint.

The Remedy

Having found that Respondent has engaged in and is engaging in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent's conduct improperly affected the results of the representation election conducted on July 20, 1965, I shall recommend that said election be set aside.

RECOMMENDED ORDER

Upon the basis of the foregoing findings and conclusions, and upon the entire record in this case, it is recommended that South Bay Daily Breeze, a Division of Southern California Associated Newspapers, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees about their union activities or the union activities of other employees.

(b) Threatening discharge of employees because of their union activities.

(c) Promising employees wage increases and rectification of inequities and granting wage increases for the purpose of discouraging membership in the Union or support thereof, and soliciting said employees not to attend union meetings.

(d) Giving employees impression of surveillance of union activities.

(e) Threatening employees with a stringent and heartless application of work rules if represented by the Union.

(f) Threatening employees with lack of opportunity for promotion to managerial positions and with blacklisting as a consequence of union activities.

(g) Refusing to bargain collectively with Local 69, Los Angeles Newspaper Guild, American Newspaper Guild, AFL-CIO, CLC, as the exclusive collective-bargaining representative of all its employees in the appropriate unit.

(h) Granting wage increases to employees in the appropriate unit without prior consultation and bargaining with the above-named Union, or any other union that may be selected as their exclusive bargaining representative.

(i) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local 69, Los Angeles Newspaper Guild, American Newspaper Guild, AFL-CIO, CLC, as the exclusive representative of all editorial department employees at Respondent's Torrance, California, plant, including the librarian and excluding all other employees, part-time contract reporters, guards, watchmen, and supervisors as defined in the Act, and embody in a signed agreement any understanding reached.

(b) Post in conspicuous places at its Torrance, California, plant, copies of the attached notice marked "Appendix."[18] Copies of said notice, to be furnished by the Regional Director for Region 31, after being signed

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[18]In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

by Respondent, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of receipt of this Decision, what steps Respondent has taken to comply herewith.[19]

It is recommended that the election conducted on July 20, 1965, in Case 31-RC-18 be set aside.

It is also recommended that paragraphs 12(b) vi and x, 12(c) ii, 12(f), and 12(g) of the complaint be dismissed.

APPENDIX

Notice to All Employees

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT interrogate our employees about their union activities or the union activities of other employees.

WE WILL NOT threaten discharge of employees because of their union activities.

WE WILL NOT promise employees wage increases and rectification of inequities nor will we

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[19]In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

grant wage increases for the purpose of discouraging membership in the Union or support thereof, nor will we solicit said employees not to attend union meetings.

WE WILL NOT give employees the impression of surveillance of union activities.

WE WILL NOT threaten employees with a stringent and heartless application of work rules if represented by the Union.

WE WILL NOT threaten employees with lack of opportunity for advancement to managerial positions or with blacklisting as a consequence of union activities.

WE WILL NOT refuse to bargain collectively with Local 69, Los Angeles Newspaper Guild, American Newspaper Guild, AFL-CIO, CLC, as the exclusive representative of our employees in the following described appropriate unit nor will we grant wage increases to employees in said unit without prior consultation and bargaining with said Union. The appropriate bargaining unit is:

> All editorial department employees in our plant in Torrance, California, including the librarian, and excluding all other employees, part-time contract reporters, guards, watchmen, and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist the above-named labor organization, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in

other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the National Labor Relations Act.

We will, upon request, bargain collectively with the above-named Union as the exclusive representative of our employees in the appropriate unit described above, and embody in a signed agreement any understanding reached.

All of our employees are free to become or to remain or to refrain from becoming or remaining members of the above-named Union or any other union except to the extent that such rights may be affected by the provisos in Section 8(a)(3) of the National Labor Relations Act.

SOUTH BAY DAILY BREEZE, A DIVISION OF SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS, INC.,

Employer.

Dated..... By.....

(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 312 North Spring Street, Los Angeles, California 90012, Telephone 688-5840.

APPENDIX C.

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX D.

National Labor Relations Act, as Amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 141 et seq., Vol. 7 U.S.C. p. 6289 et seq. (1964), in Pertinent Part.

Section 7, 29 U.S.C. 157:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title.

Section 8(a)(1), 29 U.S.C. 158(a)(1):

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

Section 8(a)(5), 29 U.S.C. 158(a)(5):

> (a) It shall be an unfair labor practice for an employer—
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title.

Section 9(a), 29 U.S.C. 159(a):

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

Section 10(b), 29 U.S.C. 160(b), in pertinent part:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board. . . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by

the Supreme Court of the United States pursuant to section 2072 of Title 28.

Section 10(e), 29 U.S.C. 160(e):

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the

satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

APPENDIX E.

Opinion of the United States Court of Appeals for the Seventh Circuit

Knoll Associates, Inc., Petitioner

v.

Federal Trade Commission, Respondent.

June 18, 1968.

Before SCHNACKENBERG, SWYGERT and CUMMINGS, Circuit Judges.

SCHNACKENBERG, Circuit Judge.

Knoll Associates, Inc., a New York corporation, petitioner, seeks our review of an order issued on August 2, 1966 by the Federal Trade Commission requiring it, directly or through its parent corporation, Art Metal, Inc., or otherwise, in connection with the sale of furniture and furniture products in commerce, to cease and desist from—

> Discriminating, directly or indirectly, the price of such furniture and furniture products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who competes with the purchaser paying the higher price.

The Commission found a violation of § 2(a) of the Clayton Act, as amended 15 U.S.C. § 13(a), which provides in part:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to

> lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *.

Certain issues explicitly raised by petitioner refer to the Commission's determination that its purchasers include interior designers, that discriminations may cause injury to competition with favored customers, to the rejection of petitioner's affirmative defense that its discriminations had been made to meet the equally low prices of competitors, and to the fact that the Commission improperly admitted into evidence and relied on documents stolen by one Herbert Prosser, an employee in the Detroit showroom of petitioner's sales representative, Joseph Dworski, and by Prosser sent to counsel for the Commission, as well as other evidence obtained from the stolen documents by Commission counsel.

This proceeding was commenced by the issuance of a complaint on December 27, 1962, charging that Knoll discriminated in price between competing purchasers of its products in violation of § 2(a) of the act. Such purchasers were said to include those classified by it as architects, interior designers, contract houses, interior decorators, office furniture dealers, and furniture or department stores. Knoll admitted charging some purchasers list prices less 50% and other purchasers in the same cities list prices less 40%, but denied that the sales to architects, interior designers and interior decorators were for resale by them, that there existed potential competitive injury, and asserted that its 50%

discounts were made in good faith to meet equally low prices of a competitor as permitted by § 2(b).

An examiner held hearings and received evidence offered by the Commission and by Knoll on the issues.

On February 24, 1964, pursuant to a notice of a hearing to be held March 9, 1964 to receive Commission evidence in rebuttal of Knoll's affirmative defense, Knoll was served with a request by the Commission counsel to admit the authenticity of certain documents. These documents later were shown to have been stolen by Herbert Prosser, an employee of Dworski, Knoll's executive sales representative in Detroit, from its Detroit showroom. This appeared when Knoll called for the production of all such documents and a full hearing and full disclosure of all the facts as to how the documents were procured. At a hearing held on March 17, 1964, Knoll called several witnesses in support of its motion, including Herbert Prosser, and then sought unsuccessfully to have the Commission counsel testify. Knoll's motion to suppress the documents admittedly taken from its showroom was denied by the examiner and the Commission.

The examiner found *inter alia* that Knoll is a New York corporation, wholly owned by Art Metal, Inc.,[1] manufacturing and selling furniture and furniture products throughout the United States; that firms, classified as designers and decorators by Knoll, actually were found to "buy and sell furniture in addition to their design service" from Knoll and other manufacturers, thus cross-competing with each other and with members

[1]Petitioner has manufacturing plants in New Jersey and Pennsylvania and showroom sales offices in various cities in the United States.

of other classes; further that Knoll uses a 10% price differential among "customers" who agree to aggressively market Knoll's products and that resulting price discriminations had the requisite proscribed effect upon competition set forth in § 2(a) aforesaid. The examiner further found that, even though Knoll's favored customers received the highest discounts from other manufacturers, Knoll failed to establish a single instance of having met a competitor's price on any identified item of furniture with an equally low price and that Knoll gave its higher discount across the board on all items on its line to its favored customers. On the basis of these findings, he concluded that Knoll's pricing practices violate § 2(a) and are not within the allowed affirmative defense of § 2(b).

Nevertheless we are now required to take cognizance of petitioner's charge that the Commission improperly admitted into the record of this proceeding and relied heavily upon certain documents stolen for that purpose by said Prosser. It is alleged that these documents, as well as other evidence obtained for use by the Commission's counsel, were used in violation of the fourth amendment to the federal constitution. It is also urged that the Commission's counsel improperly intruded upon the privacy of the attorney-client relationship between petitioner and its counsel and upon its defense preparations. In these respects, it is insisted that petitioner's right to counsel was impaired and it was deprived of due process of law as guaranteed by the fifth amendment. In view of the result which we reach in this case, it is not necessary for us to consider this latter contention of petitioner.

1. Kathryn Sanders, a witness for Knoll, testified that on December 9, 1963 she was in the Knoll showroom in Birmingham, Michigan, which was run by Joseph Dworski, and saw Regional Manager Helm, Gary A. Beals,[2] and Prosser. Dworski came in and the four men went to lunch, and she was there when they returned from lunch. She stated that then Dworski, Beals and Helm left, but Prosser remained, and, when Rose, another employee, went to a late lunch, only she and Prosser were there; that she heard Prosser make a telephone call to a Mr. "Turiel or Turrell" at the Federal Trade Commission in Washington. Prosser's part in that conversation, as heard by the witness was as follows:

> "'This is Herbert Prosser,' * * * 'I worked with Knoll Associates in Michigan,' * * * 'I have been getting a raw deal.' * * * 'The runaround, something with Knoll's, and I wonder how you would like to have me testify on the Government's Behalf.'"

The witness added that

> "* * * he did ask when the hearings were going to be in New York * * * and he said he was coming on a Christmas holiday to New York to see his family who lived there, and would be there, and would be able to testify there. * * * he was most upset, * * * but he said 'I have a lot of incriminating evidence,' or 'I have enough to hang Knoll,' * * * 'I have enough papers to hang them,' or something to that effect."

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[2]Beals understood he was to replace Dworski on January 1, 1964.

When Prosser was called as a witness for Knoll before the examiner, he testified, *inter alia:*

> During December 1963 he was employed at the Knoll showroom in Birmingham, Michigan by Beals and Dworski.

The examiner ruled that Prosser could be examined by Knoll's counsel as a hostile witness. As such, Prosser then testified that he had attended several colleges. He was shown papers (marked Exhibits CX 1914-A through 1959-B). He denied taking these papers from Knoll, but admitted taking them from Dworski, who, he said, was the agent for Knoll, and on January 5, 1964, he sent the papers via air express to the Federal Trade Commission in New York City, marked to the attention of Bernard Turiel, its attorney.

Prosser further testified that he communicated with Turiel on December 9, 1963 by phone from the office of Dworski in Birmingham. He admitted that he "may very well have" made another call to the Commission on December 10. He also admitted calling Turiel on December 10; that between that date and March 18, 1964, he spoke with Turiel, "on any number of occasions", concerning "these proceedings" between Knoll and the Commission. The subject matter of some of these conversations was "these documents" (CX 1914-A through 1959-B, which were lying in front of the witness).

On cross-examination by Mr. Turiel, the witness said that most of the telephone conversations between himself and Mr. Turiel took place after January, 1964.

When the examiner, at the suggestion of counsel for Knoll, asked if Mr. Turiel would take the stand to tes-

tify, Turiel said he was taking the position that he and Mr. Brod[3] refused to testify.

The hearing officer commented that he saw "no reason why an administrative agency should be allowed to circumvent the constitution if the courts themselves can't". He added:

> "* * * the Federal Trade Commission has the broadest investigatory and subpoena powers of any agency in the Government."

During the argument before the hearing examiner, Turiel said that he believed that these documents came into the possession of Prosser in a lawful manner. The examiner responded that he assumed that "you are going to be able to demonstrate from the record to perhaps a reviewing court that the evidence will show that."

Turiel said:

> "Well, I would like to say this so that the record is clear, counsel supporting the Complaint unequivocally deny that there were any requests, suggestion or invitation by anyone at the Federal Trade Commission—"

The hearing examiner responded:

> "I cannot accept that or pay any attention to it. You were given full opportunity to take the stand to file a statement, to make a statement, and to assert that. As far as I am concerned, that statement doesn't exist. You were given ample opportunity. I was hoping that you would. I practically told you that you ought to make that statement if it were a true statement, and your supe-

[3]Mr. Brod was also an attorney for the Commission.

riors, and the higher wisdom in Washington decided that they were going to direct you, as I understand your position today and yesterday, they were going to direct you to remain silent."

and

"* * * It is your responsibility that justice is done."

The hearing examiner also stated to Turiel:

"There has been no accusation made except that you are the recipient of evidence or have offered evidence which was stolen from the files of Knoll Associates.

"Now, that is in writing in these papers. That is the only accusation that has been made."

[1] 2. The action of the Commission in utilizing the fruits of the misconduct of Prosser violated rights of petitioner protected by the fourth amendment to the federal constitution. The undisputed evidence shows that Prosser stole the documents for the purpose of assisting the Commission counsel in the prosecution of the proceeding then pending, and the record shows that the Commission by its use of the documents knowingly gave its approval to Prosser's unlawful act. We agree with petitioner that the use of the stolen documents renders the Commission's order unenforceable. That the evidence was taken and actually used for the purpose of aiding the Commission to enforce the Clayton Act does not justify the action. Gambino v. United States, 275 U.S. 310, 317, 48 S.Ct. 137, 72 L.Ed. 293 (1927). While *Gambino* involved a criminal prosecution, its holding would apply *a fortiori* to the proceeding involved in the case before us.

The purpose of the fourth amendment to the federal constitution and its attendant exclusionary rule has usually been expressed in its application to criminal prosecutions of individuals. Thus, in Fowler v. United States, 7 Cir., 62 F.2d 656, at 657 (1932) citing Byars v. United States, 273 U.S. 28, 33-34, 47 S.Ct. 248, 71 L.Ed. 520 (1927), we quoted:

> "'The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right."

While there we dealt with a prohibition act prosecution, the purpose of that amendment and the exclusionary rule we must now view in the context of the proceeding here presented, viz., a quasi-judicial regulatory proceeding.

In view of its purpose, we must realistically examine the fourth amendment and the facts of this case in terms of the security to be afforded to "people to be secure in their persons, houses, papers and effects". We must not be misled by the legal classification of the nature of the proceeding. The Supreme Court has held that the fourth amendment is applicable (with certain exceptions, not relevant here), to corporations, whether the proceeding is criminal or, in substance and effect, quasi-criminal, and whether the proceeding is before a court or an administrative agency. Boyd v. United States, 116 U.S. 616, 634, 6 S.Ct. 524, 29

L.Ed. 746 (1886); Silverthorn Lumber Co. v. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319 (1920); and Federal Trade Commission v. American Tobacco Co., 264 U.S. 298, 307, 44 S.Ct. 336, 68 L.Ed. 696 (1924).

Nothing stated by the Supreme Court in Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946) even remotely suggests deviation from the principle that a commercial enterprise shall be protected the same as an individual person from an untrammeled exercise of authority in the name of the government. *Walling,* cited by the Commission, was concerned with the right of the administrator of the Fair Labor Standards Act, 52 Stat. 1060, to judicial enforcement of a subpoena duces tecum issued by him in an investigation pursuant to § 11(a) of that act. However, the court held that the use of a subpoena duces tecum to produce relevant documents was not a violation of the fourth amendment. The case is inapplicable here.

[2] The Commission also cites Camara v. Municipal Court, 387 U.S. 523, 528, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). However, it is significant that the court said at 530, 87 S.Ct. at 1731:

> "But we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely 'peripheral.'"

And at 532, 87 S.Ct. at 1732 it said:

> "In our opinion, these arguments unduly discount the purposes behind the warrant machinery contemplated by the Fourth Amendment."

and at 533-534, 87 S.Ct. at 1733 the court added:

> "It has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement. Thus, we do not find the public need argument dispositive.
>
> "In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interest protected by the Fourth Amendment, * * *."

The protection thus afforded by the fourth amendment against such administrative searches was extended to business premises by See v. City of Seattle, 387 U.S. 541, 546, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967).

> "Contrary suggestions or implications may be explained as dicta; or by virtue of *the presence of an actual illegal search and seizure,* the effects of which the Government sought later to overcome * * * odious in both English and American history." Walling, supra, 327 U.S. 206-207, 66 S.Ct. at 504. (Emphasis supplied.)

In the case at bar, it is clear that Knoll's property rights are to be "preserved sacred * * * in all instances where * * * not * * * taken away or abridged by some public law for the good of the whole." Boyd, supra, 116 U.S. 627, 6 S.Ct. 530. With respect to corporate documents and papers "cases where this right of property is set aside by positive[4] law are various." Boyd, supra, 627, 6 S.Ct. 530. See Wilson v. United States, 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771 (1911);

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[4] "Distresses, executions, forfeitures, taxes, &c., * * *." Boyd, supra, 627, 6 S.Ct. 524.

Walling, supra; and City of Seattle, supra. However, the basic principle of *Boyd* still applies today. As Mr. Justice Holmes stated in American Tobacco Co., ante page 534, 264 U.S. at 305-306, 44 S.Ct. at 337:

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire * * *."

[3, 4] Thus, where, as in the case at bar, there is undenied evidence of a theft of corporate documents on behalf of the government for use in a then pending proceeding against the corporate owner of what was stolen, such theft and the use thereof by the government, is as stated in Boyd, supra, 116 U.S. at 635, 6 S.Ct. at 534:

> "* * * the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment. Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence and effects their substantial purpose. * * * illegitimate and unconstitutional, practices * * * can only be obviated by adhering to the rule that constitutional provisions for the security of person and *property* should be liberally construed. * * *" (Emphasis supplied.)

Accordingly, we hold that on facts appearing in the record before us, the fourth amendment is applicable here.

3. There can be no doubt that the information and assistance Prosser supplied, whatever his motive, af-

fected the entire proceedings against Knoll.[5] The gravamen of § 2(a)—discrimination in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition—was attempted to be established by the Commission's knowing use of documents unlawfully obtained by Prosser. Thus, the Commission in its opinion stated that the trial examiner

> "* * * found that there is substantial cross-competition between the various classes of respondent's retail sellers, i. e., (a) architects vis-a-vis architects, interior designers, and retail stores; (b) interior designers vis-a-vis interior designers, architects and retail stores; and (c) retail stores vis-a-vis retail furniture stores, architects, and interior designers."

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[5]The Commission's reliance upon United States v. American Radiator & Standard Sanitary Corp., D.C., 278 F.Supp. 241 (1967) cited in oral argument, is misplaced. Actually the court's holding there, relying upon United States v. Blue, 384 U.S. 251, 255, 86 S.Ct. 1416, 16 L.Ed. 2d 510 (1966), buttressed Knoll's motion for suppression of the evidence and its fruits at the hearing on the issues. The Commission also cites Burdeau v. McDowell, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921) in support of its contention that no constitutional right of Knoll was violated by Prosser's taking of the documents belonging to Knoll, his employer, and making them available to the representatives of the Federal Trade Commission. However, the facts in *Burdeau* are clearly different from those in the case at bar. In fact the court said at 475, 41 S.Ct. 574 that the record clearly showed that no official of the government had anything to do with the seizure of petitioner's property or any knowledge thereof until months after it had been taken from him and it was therefore manifest that whatever wrong was done was the act of individuals taking the property of another. In contrast, in the case at bar, Prosser, the disloyal employee, furnished to Bernard Turiel by telephone information, which established the connection between the Commission and Knoll, resulting in Prosser's testifying as a Commission witness against Knoll. The facts in this case are the antithesis of those in *Burdeau.*

The Commission was of the opinion, emphasized by it in its brief at p. 56, that—

> "* * * probably the clearest additional proof that petitioner's present contention [that designers are not purchasers] is contrary to plain fact is a document *from its own records* * * * headed 'Customer Classifications,' * * *." (Emphasis supplied.)

Prosser's purloined documents and the evidence based thereon thus are shown to furnish directly the supposed support for the Commission's order against Knoll.

Accordingly, we hold on the facts before us that the Commission's knowing acceptance and use against Knoll of documents and information unlawfully obtained by Prosser from Knoll violated the fourth amendment to the federal constitution.

[5] 4. We have also considered the Commission's argument that the federal courts lack supervisory power over federal administrative proceedings. We find it inapplicable here. We hold that we have not only the power but the duty to apply constitutional restraints when pertinent to any proceeding of which we have jurisdiction, such as a statutory review of a federal commission decision. At stake here is the ordered concept of liberty of which Mr. Justice Holmes spoke in his dissenting opinion in Olmstead v. United States, 277 U.S. 438, 469, 48 S.Ct. 564, 72 L.Ed. 944 (1928):

> "* * * apart from the Constitution the government ought not to use evidence obtained and only obtainable by a criminal act. * * *"

In the same case, Mr. Justice Brandeis, likewise dissenting, said at 479, 48 S.Ct. at 572:

> "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. * * * The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

And, at 485, 48 S.Ct., at 575, Mr. Justice Brandeis added:

> "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

This principle, thus announced in dissenting opinions, has since been recognized by the Supreme Court as presently the law of the land. Elkins v. United States, 364 U.S. 206, 223, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960).

The record before us reveals that those who represented the Commission knew that Prosser had stolen from the office of Dworski, a sales representative of Knoll, various documents, which he turned over to representatives of the Commission, for use in this proceeding, and that they were so used.

Hence the order of the Commission issued on August 2, 1966 is set aside and this cause is remanded to the

Commission for reconsideration on the record of the proceedings heretofore made and filed herein, excepting therefrom, however, all evidence and testimony given or produced by or through the witness Herbert Prosser.

Order set aside and cause remanded with instructions.

CUMMINGS, Circuit Judge (concurring).

According to my reading of the record, the Commission and the trial examiner considered the Prosser evidence only in connection with the defense of meeting competition under Section 2 (b) of the Clayton Act, as amended (15 U.S.C. § 13(b)). Commissioner Elman's dissenting opinion opposed the entry of an order, possibly reflecting the view that the Prosser evidence permeated even the consideration of the Section 2(a) issues. If the Commission should decide to proceed with this case on remand, the Prosser evidence must be completely disregarded. Even though the Commission's conclusion under Section 2(a) appears to be supported by substantial independent evidence, it would be fairer for the Commission to pass upon both the Section 2(a) and Section (b) questions without any Prosser evidence in the record (assuming that there is reconsideration by the Commission). Therefore, I join in the judgment remanding the entire case to the Commission.

APPENDIX F.

Opinion of the Federal Trade Commision.
*Knoll Associates Inc.

[1965-1967 Transfer Binder]
¶17,668, p. 22,952 (FTC 1966).

Reprinted below are pages 22,959-22,962 of the Commission's Opinion.

. . .

The two special hearings disclosed that complaint counsel had five conversations with Mr. Prosser prior to his submission of the challenged documents. In each instance, Prosser initiated the conversation. The history of communications between the parties and the circumstances behind complaint counsel's possession of the documents are as follows:

Prosser was employed by one Joseph Dworski from January, 1961, until December, 1963. Dworski was a practicing architect in the State of Michigan and a representative of Knoll Associates. In the course of his profession, he specified Knoll furniture in some of his submissions to clients and was compensated by Knoll for all business he generated through this and other sales techniques. In addition to his practice as an architect, Dworski owned and operated a furniture showroom in Detroit in which he exclusively displayed Knoll products. Both Dworski and Prosser maintained offices in the showroom. Prosser's duties included securing design commissions for Dworski. His principal duty, however, was to promote the sale of Knoll furniture in the State of Michigan, the western tier counties of Ohio, and several counties in Indiana, surrounding the city of Fort Wayne. Originally, Dworski

compensated Prosser on a straight salary basis. Later, Prosser participated in Dworski's commissions from Knoll in addition to remaining on salary.

The initial hearings on the complaint were held in New York City during the first week of October, 1963. On October 7, 1963, the proceedings resumed in Detroit and complaint counsel, Bernard Turiel and Ernest Brod, continued with the presentation of the case-in-chief. Prosser attended most of the Detroit hearings and was introduced to Turiel and Brod by respondent's counsel on the first day of those hearings. In subsequent testimony, complaint counsel stated that prior to this introduction they had never met or heard of Mr. Prosser and upon being introduced understood him to be the local sales representative of respondent.

On October 9, the second contact between Prosser and complaint counsel occurred. Late in the evening, Prosser went to complaint counsel's hotel and called Turiel on the house phone. When Prosser said that he would prefer not to talk over the phone, Turiel invited him up to his room. A conversation of thirty minutes to an hour ensued between Prosser, Turiel and Brod, who was in Turiel's room preparing for the next day's hearing. Brod testified that the meeting "began with a good deal of sparring . . . on our side in an attempt to find out . . . the purpose of Mr. Prosser's visit." (Tr. 5555) Prosser identified himself as an employee of Dworski and told counsel that he sympathized with the attempt that the government was making to enforce the Robinson-Patman Act against Knoll. He said that he wanted to tell counsel they were doing a good job; that he felt the F.T.C. was justified in its complaint; and that he thought Knoll's pricing practices were not jus-

tified. However, he then proceeded to give a lengthy discourse on the office furniture business in general and indicated that while he was critical of Knoll's pricing practices, similar pricing practices were general throughout the furniture market.

According to Turiel and Brod, they did not question Prosser about Knoll's pricing because they already knew all about it and because they suspected Prosser. Turiel testified that he was "suspicious of the fact that he may have been sent up there by someone. I had no specific basis for this suspicion, but I found the whole visit strange and my reaction was 'Why was he up?' 'Was he sent up by someone?' And, that was my reaction when he came up, and also at the end of the visit." (Tr. 5532) Brod had a "strong suspicion" that Prosser "had possibly been sent by opposing counsel in an attempt to obtain some information from us." (Tr. 5560) Because of their suspicions, counsel refrained from discussing the case with Prosser, and did not question him about his statement that Knoll was contravening the antitrust laws. According to Brod, "we did not ask him whether he had proof. This would have been a crucial step which we were not about to take." (Tr. 5613) During the meeting, according to both counsel, Prosser never offered to assist them and never mentioned documents.

Counsel also testified that Prosser mentioned that an "outside person" had been brought into the Knoll operation in Detroit and that he thought this person would run the business after Dworski's agreement with Knoll ended on January 1, 1964. Prosser said he was not sure of this, but that, in any event, he hoped to be running Knoll's Detroit operations after January 1.

Prosser testified that he initiated the meeting with complaint counsel after a dinner with respondent's counsel at which "we had been drinking considerably." (Tr. 5438) He recalled little about the conversation except tht he told Turiel and Brod that he wished them success in the case, and that he talked broadly about his interest in "antitrust matters." (Tr. 5437) Prosser further testified that the conversation did not involve any specific matters because of a "qualified feeling on Mr. Turiel's behalf and Mr. Brod's behalf on my rather unusual visit." (Tr. 5510) He admitted that he told neither his employer nor anyone at Knoll about the visit.

Turiel told his supervisor about Prosser's visit and was advised "that it was wise to have no contact with this type of individual." (Tr. 5296) Thereafter, Turiel had no further contact with Prosser until the week of November 12, 1963, when hearings on respondent's defense were being conducted in Detroit. Prosser was scheduled to testify for respondent during these hearings and this fact was known to complaint counsel. On November 13, shortly before the morning hearings, Prosser telephoned Turiel at his hotel and inquired what he thought about the defense presentation. Turiel replied that he considered the defense "worthless" and then hung up. He testified that he then communicated his suspicion of Prosser to his co-counsel, Brod. During the defense presentation that morning Turiel requested that Prosser and another individual be excluded from the hearing room. This was the first time that he requested the exclusion of potential witnesses during the trial. As for Prosser, he denied making the phone call described by Turiel.

The next communications between Prosser and complaint counsel occurred in December. On the 9th and 10th of that month, Prosser made two long distance phone calls from Dworski's showroom to Turiel in Washington. The record shows that the calls stemmed from a quarrel between Prosser and certain Knoll officials. The quarrel, in turn, was the result of months of worry experienced by Prosser about his future employment status.

It appears that prior to September of 1963, Prosser was virtually in charge of all of Dworski's operations for Knoll. In the first week of September, Gary Beals, a Knoll employee, was transferred from respondent's Dallas office to Detroit. When he began working in Dworski's showroom, he was the only Knoll employee in the Detroit area. Prosser was told that Beals was in Detroit to orient himself on respondent's operations within the midwest area. However, Prosser was aware that Dworski's contract with Knoll expired at the end of the year. He had a number of conversations with Dworski on the matter and understood that the latter was trying to negotiate a renewal with respondent. During the months immediately following the appearance of Beals on the scene, Prosser attempted to ascertain Dworski's future status from respondent but received no answer one way or the other.

On December 9, Prosser attended a luncheon meeting with Dworski, Beals and John Helm, the head of respondent's Central Sales Division. Prosser got into an argument with Helm. He wanted to know whether Knoll would employ him after Dworski's contract with respondent expired on December 31. Helm said he could not give him an answer for a week or ten days.

Prosser lost his temper and started shouting at Helm. According to Dworski, "he indicated that if he was not taken care of . . . that he could very easily change his way of thinking as far as this F. T. C. hearing is concerned and become a government witness." (Tr. 4399)

The same afternoon Prosser made a phone call from the showroom to Turiel in Washington. He contrived to have other employees of Dworski overhear this conversation. One who did testified that she heard Prosser offer to testify on behalf of the government and heard him say, "I have a lot of incriminating evidence" and "I have enough papers to hang them." She also testified that Prosser had made such statements in her presence before. After concluding his call to Turiel, Prosser talked with Gary Beals, the "outside person," and told him that he had called Turiel and offered himself as a witness. Beals asked him why and Prosser replied, "well, I am just telling you that if I get knifed by Knoll, and they don't make me the kind of offer for employment, I will make myself available for the Federal Trade Commission." (Tr. 4462) The record reveals that in addition to Dworski's other employees and Beals, Dworski and William Nolan, respondent's Vice-President, were aware of Prosser's conversation on the 9th with Turiel.

Turiel could recall having only one conversation with Prosser in December but did not deny that there could have been two. His recollection of his communication with Prosser during the relevant period was that Prosser informed him that he was terminating his employment with Dworski; claimed that he had been unfairly treated by Knoll; and offered to testify on behalf of the complaint. Prosser also claimed he had some papers that

would be of assistance to complaint counsel and offered to mail them to the Commission. Turiel did not inquire about the papers and rejected Prosser's offers. He told Prosser that if complaint counsel wanted to talk to him they would get in touch with him.

Prosser acknowledged calling Turiel on December 9 and 10. He admitted offering to testify for the complaint and admitted offering to provide relevant documents. Upon questioning by the hearing examiner, he stated that Turiel expressed a "very indifferent attitude" and told him he had "no interest" in the proffered documents "whatsoever." (Tr. 5521-22)

On January 2, Prosser called the Federal Trade Commission offices in Washington and found that Turiel was visiting his parents in New York City. After some difficulties in finding for himself the correct phone number, Prosser called Turiel in New York. He repeated his offer to supply documents relevant to the proceeding. According to Turiel, Prosser stated: (1) that he was no longer scheduled to testify for Knoll, (2) that instead, Dworski and Osetek, a former employee of Dworski, would testify regarding the question of meeting competition, (3) that the offered documents would negate the testimony of these men, (4) that he, Prosser, was responsible for maintaining certain files for Dworski and that he had himself authored certain documents in the files, and (5) that the proffered documents were obtained as a result of an instruction he received from Knoll officials and Knoll's counsel to weed out documents that were damaging and harmful to Knoll's defense. On the basis of these statements and after receiving assurances from Prosser to the effect that the documents were from his own personal files

and were not the property of respondent, Turiel agreed to look at the offered material. In doing so, he went against the advice of his immediate superior and that of a senior attorney in his particular trial division. Both men, prior to the January 2 offer of assistance by Prosser, had advised Turiel to have nothing to do with Mr. Prosser. Turiel acknowledged this fact but claimed that Prosser's statements on January 2 and modified his original distrust of Prosser and convinced him that he had a professional obligation to examine the documents.

The testimony of Prosser and another witness establish that he took some of the documents on the morning of December 10 from Dworski's showroom. Prior to his actions of the day before and until Knoll took over the lease of the premises on January 1, 1964, Prosser had, and was permitted to retain, keys to the showroom. Prosser also testified that he took the remainder of the documents from the showroom during the period from December 9 through 19. He said the documents were obtained from his own office files and those of Dworski.

The testimony of several witnesses shows that Prosser displayed or spoke of the documents to others prior to sending them to complaint counsel. Shortly after December 9, he took documents into the Detroit showroom of Herman Miller, Inc., a competitor of Knoll, and asked help in wrapping them from Mary Stevens, an acquaintance employed in the showroom. Miss Stevens testified that Prosser told her that he had taken the papers from Dworski's showroom and that he intended to mail them to the "government attorney in Washington." She further testified that Prosser, using his credit card, attempted to call a Commission attorney from her

office but was unable to make the connection. He then called the Federal building in Detroit in order to find out the address of the Federal Trade Commission in Washington to which he could mail the documents. However, he did not mail the documents on that date. On December 13, Prosser informed Jesse Osetek, a former employee of Dworski and a man scheduled to testify for Knoll in January, that he had records at home that would be damaging to Knoll's position in this proceeding. Finally, on January 4, 1964, Prosser returned to the Herman Miller showroom, wrapped documents before an employee of the Miller company, and stated that he was going to send them to the Federal Trade Commission. The documents were received through the mail by complaint counsel several days later.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 962

SOUTH BAY DAILY BREEZE, A DIVISION OF SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–14a) is reported at 415 F. 2d 360. The Board's decision and order (Pet. App. 19a–61a) are reported at 160 NLRB 1850.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1969, and a timely petition for rehearing was denied on September 19, 1969. The petition for a writ of certiorari was filed on December 18,

374-201—70

1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in an unfair labor practice proceding, the National Labor Relations Board is precluded by the Fourth Amendment from considering a document which was taken without permission by an employee from his employer, where the Board's General Counsel, who offered the document in evidence, had no prior knowledge of the unauthorized taking.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourth Amendment to the Constitution of the United States and the relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the Appendix to the petition (Pet. App. 62a–66a).

STATEMENT

Petitioner Company publishes a daily newspaper, the South Bay Daily Breeze, in Torrance, California. In April 1965, Loel Schrader, an international representative of the Los Angeles Newspaper Guild, commenced an organizational campaign with the assistance of three of the Company's editorial employees (Pet. App. 22a; Tr. 44, 46.)[1] Within a few days, 15 of the Company's 25 editorial employees had signed

[1] References to the stenographic transcript of the testimony before the Board are designated "Tr." References designated "G.C. Exh." or "Co. Exh." are to the exhibits of the General Counsel and the Company which were introduced at the Board hearing.

authorization cards and Schrader requested the Company to recognize the Guild as bargaining agent (Pet. App. 23a; Tr. 26, 52–54; G.C. Exh. 1(d), 7). The Company refused to accede to the request (Co. Exh. 12). On July 20, 1965, a Board representation election was held, which resulted in a tie vote (Pet. App. 25a; G.C. Exh. 1(p)). Shortly thereafter, the Guild filed objections to the election (G.C. Exh. 1(h)) and charges alleging that the Company had engaged in conduct violative of Section 8(a)(1) and (5) of the Act in connection therewith (G.C. Exh. 1(j)). The two cases were consolidated for hearing before a trial examiner of the Board (Pet. App. 21a; G.C. Exh. 1(r)).

The Board, adopting the decision of its trial examiner, found that the Company had violated Section 8(a)(1) of the Act by interrogating employees about their union activities; by threatening them with discharge, blacklisting, and lack of opportunity for promotion to managerial positions because of those activities; by promising wage increases and other benefits, and granting wage increases, to discourage union activities; by soliciting an employee not to attend a union meeting; by giving employees the impression of surveillance of their union activities; and by threatening employees with a stringent and heartless application of work rules if the Guild won the election (Pet. App. 55a). The Board also found that the Guild had valid authorization cards from a majority of the unit employees, that the Company's denial of recognition was in bad faith, and that the Company thus had vio-

lated Section 8(a)(5) by refusing to bargain with the Guild and by unilaterally granting wage increases to employees (Pet. App. 49a–54a, 56a).

The Board ordered the Company to cease and desist from the unfair labor practices found and from interfering in any other manner with the employees' rights under the Act. The Board also ordered the Company to bargain, upon request, with the Guild and to post appropriate notices (Pet. App. 56a–61a). Finally, the Board set the election aside (Pet. App. 55a–56a). The court of appeals (with District Judge Byrne dissenting in part)[2] sustained the Board's findings and conclusions and enforced its order (Pet. App. 1a–14a).

In finding that the Company violated the Act, the trial examiner relied in part (Pet. App. 29a, n. 3, 30a, n. 4, 38a, 53a–54a) on a memorandum prepared during the campaign by the Company news editor, Kenneth Johnson, for use by the publisher and other supervisory personnel. The memorandum contained a list of employees with the editor's evaluation of their stands on the Guild and suggestions of ways to win over Guild adherents (Pet. App. 29a, n. 3; G.C. Exh. 18). The only issue raised by the instant petition concerns the propriety of introducing and considering this memorandum, consistent with the Fourth Amendment, in an unfair labor practice proceeding before the Board. The facts relating to the memorandum are as follows:

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[2] Judge Byrne would not have enforced the bargaining order because, in his view, misrepresentations occurred in the solicitation of the authorization cards (Pet. App. 14a–18a).

The memorandum was offered into evidence by counsel for the Board's General Counsel, in the course of the testimony of Gary Gillis, a former employee who had been an active Guild adherent (Tr. 89–90). Thereafter, under questioning by Company counsel, Gillis admitted that it was a copy of a document which he had taken from City Editor J. Berman's desk drawer without the latter's knowledge or permission, and which he had then turned over to Guild Representative Schrader (Tr. 93–94). Gillis further testified that he copied the document early in the organizational campaign, that he gave it to Schrader a couple of weeks later, and that he had no intention of giving it to a Board agent and had never discussed his action with such agent (Tr. 98–100). The trial examiner overruled the Company's objection to receipt in evidence of the memorandum, on the ground that the Board permits use of "documents allegedly purloined unless it is established that an agent of the government has been a party to its unlawful seizure" (Tr. 151).[3] The court of appeals sustained that ruling on the authority of *Burdeau* v. *McDowell*, 256 U.S. 465 (Pet. App. 4a–5a).

ARGUMENT

The sole question presented here is whether the Board properly declined to exclude a document which had been turned over to a Board agent by the charg-

[3] See *Andrew Jergens Co.*, 27 NLRB 521, 524–525; *Air Line Pilots Ass'n*, 97 NLRB 929, n. 1; *General Engineering, Inc.*, 123 NLRB 586, n. 2.

ing party in circumstances where neither the Board agent, nor even the charging party,[4] knew that an employee union adherent had taken the document without permission from his superior's desk drawer. This issue does not warrant further review, for this Court long ago held that the Fourth Amendment does not bar use by the government, even in a criminal proceeding, of documents obtained unlawfully by private individuals without complicity by governmental agents, since, in that situation, there has been no unlawful search or seizure by the government itself. *Burdeau* v. *McDowell,* 256 U.S. 465. More recently, the Court reaffirmed that the Fourth Amendment only gives "security * * * [from] unwarranted *governmental* intrusion." *Hoffa* v. *United States,* 385 U.S. 293, 301 (emphasis added).

Contrary to petitioner's contention, *Elkins* v. *United States,* 364 U.S. 206, has not undermined *Burdeau.* The issue in *Elkins* was whether evidence which had been illegally seized by State officers and turned over to federal officers could be used by the latter in a federal criminal proceeding. The Court, in the exercise of its supervisory power over the ad-

[4] Petitioner's statement that the evidence was "obtained through theft by the charging party" (Pet. 2–11, n. 14) is in error. The charging party is the Guild and there is no basis for concluding that Gillis, the employee who took the document, acted as an agent of the Guild in doing so. There is no evidence that International Representative Schrader was in any way implicated in the theft, or, in fact, knew how Gillis had obtained the document. Moreover, Gillis obtained the document early in the campaign, before charges with the Board had even been filed by the Union (*supra,* p. 5).

ministration of criminal justice in the federal courts, barred the use of such evidence by the federal officers in order to protect the "[f]ree and open cooperation between state and federal law enforcement officers" against "subterfuge and evasion" (364 U.S. at 221–222). Nothing in this rationale warrants extending *Elkins* to the acts of private individuals; indeed, *Burdeau* was not even cited in *Elkins*. Moreover, since *Elkins* the lower courts have consistently continued to follow the rule of *Burdeau* where, as here, unlawfully obtained evidence has been turned over to a government official by a private party who acted independently and without the knowledge of the government. See *United States* v. *McGuire*, 381 F. 2d 306, 313, n. 5 (C.A. 2), certiorari denied, 389 U.S. 1053; *United States* v. *Goldberg*, 330 F. 2d 30, 35 (C.A. 3), certiorari denied, 377 U.S. 953; *United States* v. *American Radiator & Standard Sanitary Corp.*, 278 F. Supp. 241, 249–252 (W.D. Pa.).

Notwithstanding petitioner's repeated claim in this regard, the holding in *Knoll Associates* v. *Federal Trade Commission*, 397 F. 2d 530 (C.A. 7) (Pet. App. 67a–82a) is not in conflict with the decision below. In *Knoll*, unlike here, the record showed that Prosser, the disloyal employee, not only stole the documents for specific use in an ongoing Commission proceeding against the employer, but had discussed the documents in telephone conversations with Commission attorney Turiel well before they were introduced in evidence at the hearing (Pet. App. 72a, 79a, n. 5). As the Seventh Circuit found, "those who represented

the Commission knew that Prosser had stolen from the office of Dworski, a sales representative of Knoll, various documents, which he turned over to representatives of the Commission for use in this proceeding, and that they were so used" (Pet. App. 81a). These circumstances established a critical link between the individual and the government which was absent both in *Burdeau* (see Pet. App. 79a, n. 5) and here.[5]

Petitioner's fear (Pet. 14) that the holding below "provides inducement to the Government to encourage illegal private action and to barter with thieves for the fruit of their crimes" ignores the fact that, in this case, the Board agent did not know the document was stolen when he received it (see Pet. 14, n. 18). In fact, so far as the record shows, even the Guild did not know the document was stolen when employee Gillis gave it to International Representative Schrader. And, as the court below added, "Nor are employers or employees 'free' to steal documents; civil and criminal remedies are readily available to deal with such conduct, and we have been provided with no persuasive evidence that those remedies are or will be ineffective" (Pet. App. 7a).

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[5] Petitioner also contends (Pet. 5–8) that *Knoll* conflicts with the instant case on the issue of whether the Fourth Amendment exclusionary rule applies to cease and desist proceedings before federal administrative agencies. While the court below indicated that it did not believe that the rule was applicable to such proceedings (Pet. App. 6a), its view on this issue is dictum since it did rest its holding on "the *Burdeau* mandate" (*ibid.*).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

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SOUTH BAY DAILY BREEZE, a Division of Southern California Associated Newspapers, Inc.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petitioner's Reply Brief in Support of Petition for Writ of Certiorari.

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Petitioner's Reply Brief in Support of Petition for Writ of Certiorari.

Three of respondent's arguments in opposition to this petition deserve reply, although none of them rebuts the reasons stated in the petition for granting the writ.

I.

The only ground advanced by respondent in opposition to this Court's review of petitioner's first question —whether the exclusionary rule applies to evidence introduced by the Government in administrative cease-and-desist proceedings—is that the statement of the court below on this issue is dictum (Opp. Br. 8, n.5). Significantly, respondent does not attempt otherwise to avoid the admitted conflict between the decision below and *Knoll Associates v. FTC* with respect to this issue.

Respondent's argument lacks merit. The questions presented to the Ninth Circuit were whether the Fourth

Amendment exclusionary rule applies to the Board's proceeding, and if so, whether it requires that the evidence be excluded. The court resolved both in the negative. Resolution of either of these questions was sufficient to sustain the Ninth Circuit's decision, and therefore, neither is dictum. As this Court has explained:

> ". . . [W]here there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other.'" *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 486 (1924) (Citations omitted).

Accord, Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949); *Massachusetts v. United States*, 333 U.S. 611, 623 (1948); *Application of Hession*, 296 F. 2d 930, 935 (C.C.P.A. 1961).

II.

As to petitioner's second question—whether the Fourth Amendment requires the exclusion of evidence obtained through private theft and introduced by the Government in administrative proceedings—respondent purports to distinguish *Knoll Associates v. FTC* on two grounds: (a) that unlike the General Counsel in this case, the FTC's attorney used the documents with knowledge that they had been stolen; and (b) that unlike Gillis, the thief in *Knoll* took the documents for the purpose of assisting the Commission. The distinctions are untenable.

Contrary to respondent's statement (Opp. Br. 5), the General Counsel offered the document into evidence

after Gillis testified how he had obtained it. After the document was identified and authenticated (R.T. 89-93) Gillis described on *voir dire* examination by petitioner's counsel how he had acquired it (R.T. 93-94). Over petitioner's objection, the General Counsel then offered it into evidence (R.T. 95). Thus, conceding *arguendo* that the General Counsel did not know of Gillis' theft until the hearing,[1] he learned of it before using the stolen document as evidence. Similarly in *Knoll,* counsel for the Federal Trade Commission sought to use documents after learning that they had been acquired by theft. The "critical link between the individual and the government" (Opp. Br. 8) is present in both cases and respondent's distinction on this ground fails.

Respondent's second distinction—that the motives of the two thieves were different—is immaterial to the questions presented. As explained in the petition, the Seventh Circuit's opinion makes clear that the thief's motives were irrelevant to its decision to exclude the evidence (Pet. 11). Gillis' motives are likewise unimportant to the issue presented here.

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[1]There are strong inferences to the contrary. Respondent declares that Gillis testified that he had never discussed his action with an agent of the Board (Opp. Br. 5). In fact, however, Gillis testified only that he did not discuss his action with a Board agent prior to his copying of the document (R.T. 99, ln. 19-21). The General Counsel had the document in his possession before it was marked for identification (G.C. Exh. 18). It is reasonable to infer therefrom that he read it before the hearing and discussed with Gillis how he had obtained it. Indeed, the nature of the document itself suggests that the means by which Gillis obtained it were questionable.

III.

Respondent also maintains that Gillis' theft cannot be attributed to the charging party, the Los Angeles Newspaper Guild, because it did not authorize him to steal documents (Opp. Br. 6, n. 4). This argument ignores the findings of the Board about the intimate relationship between Gillis and the Guild during the organization campaign.

When the campaign started, Gillis and a Guild representative conferred about the solicitation of authorization cards. The representative supplied Gillis with copies of other Guild contracts, information about Guild dues, and instructions about soliciting employees (Pet. App. B, pp. 22a-23a). Gillis then distributed cards and solicited signatures. During the course of the campaign he stole the document in question. Gillis testified that his purpose in taking it was to refute statements of company representatives in the campaign (R.T. 98-99).

The Board found that Gillis was one of two "key" solicitors for the Guild (Pet. App. B, p. 23a). Two of the Guild's fifteen cards were rejected below because Gillis had misrepresented their legal effect (Pet. App. A, pp. 11a-12a; Pet. App. B, pp. 46a-47a). Although there is no evidence that the Guild authorized Gillis to misrepresent the nature of the cards he solicited, his misstatements were attributed to the Guild in the unfair labor practice proceeding. Similarly, although there is no evidence that the Guild instructed Gillis to rifle his supervisor's desk when it appointed him a solicitor, he did so during the campaign to aid the Guild's solicitation effort. The connection between Gillis and the Guild is thus entirely sufficient for purposes of the questions here presented.

Conclusion.

Respondent's brief is most significant for what it does not contain. The only reason advanced in opposition to the first question presented in the petition is technical and erroneous. By failing to address the issue itself, respondent has emphasized the importance of a resolution by this Court of an admitted conflict between the Courts of Appeals. A quibble about the connection between Gillis and the Guild and an unsuccessful distinction between the decision below and *Knoll Associates v. FTC* (based in part on a misstatement of the record in this case) constitute respondent's opposition to the second question in the petition. Finally, respondent's only opposition to this Court's revew of petitioner's third question—whether the National Labor Relations Act prohibits the enforcement of a Board order based on evidence obtained through theft of the charging party—is its declaration that Gillis' theft was unauthorized. Again, respondent has accentuated the importance of this basic issue by electing not to discuss it.

For the reasons stated, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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February 3, 1970.

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